TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1921

No. [redacted]246

CHARLES OLIN, APPELLANT,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MARCH 7, 1921.

(28,143)

(28,143)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 786.

CHARLES OLIN, APPELLANT,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 18, 1921.

IN

The United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

CHARLES OLIN,

Complainant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. OLCOTT, I. N. FLEISHNER, C. F. STONE, MARION JACK, and FRANK WARREN,

Respondents.

Upon Appeal from the District Court of the United States for the District of Oregon.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the District of Oregon.

INDEX

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

WM. P. LORD,
Lewis Building, Portland, Oregon

ARTHUR I. MOULTON,
Lewis Building, Portland, Oregon
For Appellant.

GEORGE M. BROWN,
Attorney General for the State of Oregon

I. H. VAN WINKLE,
Assistant Attorney General,
For all of Appellees but
Perry Kitzmiller.

W. W. BANKS,
Yeon Building, Portland, Oregon.
For Appellee Perry Kitzmiller.

In The United States Circuit Court of Appeals for the Ninth Circuit

CHARLES OLIN,
Complainant and Appellant.

vs.

PERRY KITZMILLER, R. E. CLANTON,
CARL SHOEMAKER, BEN W. OLCOTT,
I. N. FLEISCHNER, C. F. STONE,
MARION JACK, and FRANK WARREN.
Respondents and Appellees.

CITATION:

UNITED STATES OF AMERICA,—ss.

To Perry Kitzmiller, R. E. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleischner, C. F. Stone, Marion Jack, and Frank Warren, respondents and appellees above named and

To W. W. Banks, Esq., Attorney for respondent Perry Kitzmiller, and to George M. Brown, Attorney General of the State of Oregon, and I. H. Van Winkle, Assistant Attorney General:

GREETING:

WHEREAS, Charles Olin has appealed to the United States Circuit Court of Appeals from the judegement

and decree made and rendered in the above entitled court in the above entitled cause, and entered therein on the 23rd day of June 1919, dismissing complainant's bill of complaint in the above entitled cause, and which decree was in favor of the respondents and against the complainant in the above entitled cause, and the said appeal has been allowed, and the security required by law has been given;

NOW THEREFORE, you and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from and after the date of this citation, to show cause, if any there be, why the judgement order and decree appealed from should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Wolverton, Judge of the District Court of the United States for the District of Oregon, with the seal of said court hereunto affixed this 15th day of December 1919.

CHARLES E. WOLVERTON,
Judge of the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
District of Oregon,
County of Multnomah. } ss.

Due service of the within citation is hereby admitted in Multnomah County, Oregon, this 15th day of December, 1919.

W. W. BANKS,
Attorney for the Respondent and Appellee Perry Kitzmiller.
GEORGE M. BROWN,
Attorney General of the State of Oregon,
By JNO. O. BAILEY,
Assistant Attorney General. Attorneys for R. E. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleischner, C. F. Stone, Marion Jack and Frank Warren, constituting the Board of Fish and Game Commissioners for the State of Oregon.

In the District Court of the United States for the District of Oregon.

MARCH TERM, 1919.

BE IT REMEMBERED: That on the 2nd day of May ,1919, there was duly filed in the District Court of the United States for the District of Oregon a *Bill of Complaint* in words and figures as follows, to-wit:

In the District Court of the United States in and for the District of Oregon

CHARLES OLIN,

Complainant,

vs

PERRY KITZMILLER, R. C. CLANTON,
CARL SHOEMAKER, BEN W. OLCOTT,
I. N. FLEISCHNER, C. F. STONE,
MARION JACK, and FRANK WARREN,

Respondents.

NO. 8406
COMPLAINT
FILED MAY 2, 1919

TO THE HONORABLE JUDGES OF THE ABOVE ENTITLED COURT IN EQUITY SITTING:

The Bill of Complaint of Charles Olin, exhibited against the respondents to cancel and set aside certain fishing licenses to catch and take salmon from the waters of the Columbia River over which the States of Oregon and Washington have concurrent jurisdiction, issued by the Master Fish Warden, of the State of Oregon, and direct by a mandatory injunction that the said Master Fish Warden issue complainant certain fishing licenses, is now brought to your Honors in this district for the causes and matters hereinafter set forth, and thereabout your orator complains and alleges:

Par. 1.

That the complainant, Charles Olin, is a native of

Finland, Empire of Russia, but on or about the 29th day of April, 1889, complainant came to the United States of America and ever since that time, except for a short period of time when he resided in Multnomah County, Oregon, has been a resident of Cascade Locks, Hood River County, in the State of Oregon, where complainant and his family resided and is engaged in the occupation of fishing for salmon in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, by means of fishing appliances known as set-nets, hereinafter described.

Par. 2.

That on or about the 22nd day of March, 1892, the defendant, pursuant to laws of the United States of America, filed with the Clerk of the Circuit Court of the County of Multnomah, a declaration of his intention to become a citizen of the United States of America, and the complainant was thereby, under the Constitution and Laws of the State of Oregon, permitted to exercise the privileges of a citizen of the United States, in respect to voting at elections and to follow his occupation as a fisherman in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction; that subsequent to complainant's declaration of intention to become a citizen, as aforesaid, complainant applied to the Circuit Court of the State of Oregon of Multnomah County, for an order extending complainant's time to perfect

his second papers, and such order was made so that complainant's application to become a citizen, was in full force and effect on the 9th day of March, 1918; that prior to the 9th day of March, 1918, complainant had applied to the Circuit Court of the State of Oregon for Hood River County for his second papers, having in the meantime removed himself and family to Cascade Locks as aforesaid, but the Clerk of the Circuit Court of Hood River County, having made an error and mistake in executing complainant's application for second papers, by inserting in such proceedings the date of complainant's first declaration of intention to become a citizen on the 24th day of March, 1892, instead of inserting therein, the date on which complainant renewed or caused this application to be extended, so that on or about the 9th day of March, 1918, there was a question as to the legality and validity of complainant's naturalization proceedings, and by reason of such mistakes and errors, the complainant, under the advise of the immigration authorities, on the 9th day of March, 1918, filed a new declaration of his intention to become a citizen of the United States, all of which facts were well known to respondents, Perry Kitzmiller, and R. E. Clanton, as will more fully hereinafter appear.

Par. 3.

That by reason of complainant's status, as aforesaid, and having been issued licenses by the State of Oregon, complainant was entitled for many years, by reason of existing laws and recognized customs of the

State of Oregon, to follow his occupation as a salmon fisherman in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, and had followed such occupation in the waters of the Columbia River near Cascade Locks in Hood River County, Oregon, for a period of twenty-five (25) years prior to the 23d day of February, 1915, and thereafter on the 23d day of February, 1915, pursuant to the terms and provisions of Chapter 188 of the Session Laws of Oregon, for 1915, reference being made to Section 5 and 7 of said act, complainant was entitled to, by reason of his residence and status aforesaid, and by reason of a proper application having been filed with the authorities of the State of Oregon, for a license to catch and take salmon in said waters, and did receive a license from the proper authorities of the State of Oregon, to catch and take salmon from the waters of the Columbia River as aforesaid, by means of a set-net, in the locations hereinafter described for the years 1915, 1916, 1917 and 1918, and complainant would be possessed of the rights and licenses to take and catch salmon in said waters for the year 1919, and years subsequent thereto by means of set-nets as aforesaid in said locations, but for the fraudulent acts and things herein complained of brought about and done by the respondents, R. E. Clanton and Perry Kitzmiller, as will more fully appear hereinafter.

Par. 4.

That respondent, Ben. W. Olcott, is Governor of the State of Oregon and ex officio chairman of the

Fish and Game Commission of the State of Oregon; that respondents, I. N. Fleishner, Frank Warren, C. F. Stone, and Marion Jack are the duly appointed members of the Fish and Game Commission of the State of Oregon, and that respondent, Carl Shoemaker, is Master Game and Fish Warden of the State of Oregon, and R. E. Clanton is Superintendent of hatcheries of the State of Oregon, and said R. E. Clanton has been issuing fish licenses to catch and take salmon from the waters of the State of Oregon and from the waters over which the State of Oregon and the State of Washington have concurrent jurisdiction, as a de facto officer, and did actually issue the set-net licenses to catch fish in the waters of the Columbia River, hereinafter mentioned that each of said respondents arbitrarily refused to recognize the rights of complainant hereinafter set forth, claiming to act by virtue of Chapter 292 of the Session Laws of Oregon for 1919, to the irreparable injury of complainant as will more fully hereinafter appear; that respondent, Perry Kitzmiller, is a citizen of the United States of America and has been a resident of the State of Oregon for many years prior to the filing of this suit, and said respondent was an employee of the Fish and Game Commission of the State of Oregon at a fish hatchery located at Bonneville, Multnomah County, Oregon, near the locations where complainant has been issued licenses to catch and take salmon, hereinafter set forth, and under the immediate direction, control and supervision of respondent, R. E. Clanton, until on or about the 31st day of March, 1919, when the respondent resigned from his said employment for the

purpose of more effectually accomplishing the ends sought by said respondents, R. E. Clanton, and his coadjutor, Perry Kitzmiller, as hereinafter more specifically alleged and set forth.

Par. 5.

That for more than twenty years prior to the matters and things hereinafter alleged and set forth, there had been existing and does now exist, in the office of the Master Fish and Game Warden and with the constituted authorities of the State of Oregon, having control over the administration of the laws of the State of Oregon enacted for the regulation of salmon and other fishing, a certain general, uniform, and continued usage and custom, rule, regulation and practice generally acquiesed in by all persons that any person who, pursuant to existing law and who was otherwise qualified, upon tender of the fees required therefor, who had filed an application with such authorities for the issuance to him of a license or licenses to catch and take fish in any and all of the waters of the State of Oregon and in waters of the State of Oregon over which the States of Oregon and Washington have concurrent jurisdiction, to issue a license or licenses to such applicant for the location and kind of fish appliances applied for, and the person receiving such license or licenses was entitled to have issued to him such license or licenses for the same locations for the next succeeding year to the exclusion of any other person who may apply therefor, in event application was made to renew

license or licenses, by the person holding such license or licenses so issued for the previous year, prior to the expiration thereof, and by reason of such general usage and custom, the right to renew such fishing licenses was a property right in a person holding the same, and said right of renewal of fishing licenses, is recognized by the laws of the State of Oregon, all of which was well known to the respondents and each of them.

Par. 6.

That for the year 1918, and for several years prior thereto, the proper constituted authorities of the State of Oregon, had issued to complainant licenses to catch salmon by means of set-nets in the waters of the Columbia River over which the States of Oregon and Washington have concurrent jurisdiction for the following locations, towit:

1000 ft. below mouth of Eagle Creek, District No. 1

2000 ft. below Harrison's Wheel, District No. 1

Mouth of Eagle Creek, District No. 1.

Opposite Bradford's Island on Oregon Shore, District No.1.

At Bradford's Island on inside of slough, 900 ft, below Harrison's Wheel, District No. 1.

At mouth of canal at Cascade Locks District No. 1.

1 mile below Cascade Lockes, District No 1.

900 ft. below mouth of canal at Cascade Locks, Oregon, District No. 1.

90 ft. above the mouth of Cascade Locks Canal, District No. 1.

and complainant, relying on usage and custom, had invested large sums of money in purchasing set-nets and fishing appliances to fish for salmon in the said locations in the waters of the Columbia River, and had on or about the first day of April, 1919, and some time prior thereto, invested the sum of Five Thousand Dollars, ($5000.00), in appliances for the catching and taking of salmon as aforesaid, and was earning in his said occupation the sum of Four Thousand Dollars, ($4000.00) per year, all of which was well known to respondent, Perry Kitzmiller.

Par. 7.

"That some time prior to the 17th day of February, 1919, the respondent, Perry Kitzmiller, while he was an employee of the State of Oregon in the said fish hatchery at Bonneville, became informed and advised of the great value of complainant's said fishing locations and the money which was and could be derived from fishing for salmon with set-nets in said waters, and likewise become aware and advised of complainant's status as to his citizenship and therefor, and on or about the 20th day of January, 1919, the said respondent, Perry Kitzmiller, set about ways and means to secure from the State of Oregon and to have issued to him to the exclusion of complainant by the said Master

Fish Warden of the State of Oregon, set-net licenses to fish for salmon in the waters of the Columbia River in the locations in said waters for which complainant had heretofore been issued licenses to fish for salmon as aforesaid, and which licenses by reason of complainant's status under existing laws and customs of the State of Oregon as aforesaid, complainant was entitled to have renewed and issued to him, by making application to the Master Fish Warden of the State of Oregon on the 1st day of April, 1919, at which time, complainant's said set-net licenses would expire. Your orator further charges that the said respondent, Perry Kitzmiller, a short time prior to the 17th day of February, 1919, being actuated with the desire to obtain the set-net licenses for the locations hereinbefore described, to which complainant would be entitled, by reason of existing law and customs of the State of Oregon as aforesaid, to the exclusion of every one else and to get the control thereof, set about a plan or scheme to contrive or plot the obtaining of all of said licenses to his own use, benefit or behoof or the joint use benefit and behoof of himself, the said Perry Kitzmiller, all of which your orator further charges the said respondents actually accomplished, as he believes and now does believe. And so it was, your orator further charges, that the said respondent, communicated the facts of the value of the fishing locations in said waters, for which complainant had been issued licenses, and his said desire to obtain fishing licenses to I. N. Fleishner, R. E. Clanton and Carl Shoemaker, who thereupon with

divers other persons conspired, confederated and agreed together to bring about legislation of the State of Oregon designed to prohibit the issuance of liceneses to persons who were not citizens of the United States, excepting, however, in the operation of said law, all gill-net and troll fishermen, and thereby prevent a renewal of the aforesaid licenses for the said described locations heretofore issued to complainant as aforesaid.

Par. 8.

"And your orator further charges that with the purpose and effect of carrying out and furthering the objects of their said conspiracy, and to obtain for respondent, Perry Kitzmiller, said licenses from the State of Oregon, co-operating together and with other persons not fully known to your orator and not necessary now to mention, and too numerous and redundant to set forth herein, but of whom respondents, R. E. Clanton and Perry Kitzmiller, well known and are fully advised, and to further carry out and efectuate the said matters, knew and were apprised that said complainant would cause a renewal of said set-net licenses to be made by the Master Fish Warden on the 1st day of April, 1919, and that under existing laws and customs, of the State of Oregon, that respondent, Perry Kitzmiller, could not secure set-net licenses to fish said locations in the waters of the Columbia River from the Master Fish Warden, to which licenses had been heretofore issued to complainant, conceived it necessary to bring about the enactment of a new law

by the Legislative Assembly of the State of Oregon, which would prohibit the Master Fish Warden of the State of Oregon issuing set-net licenses to complainant to fish for salmon in the waters of the State of Oregon, over which the States of Oregon and Washington have concurrent jurisdiction, and to that end caused respondent Carl Shoemaker, the Master Fish Warden of the State of Oregon to prepare and submit to the Committee on Fishers of the Legislative Assembly of the State of Oregon, a bill which would prohibit the Master Fish Warden to issue to complainant the set-net licenses to fish for salmon in the hereinbefore described locations in the waters of the Columbia River, and thereafter the passage of said bill by the Legislative Assembly of the State of Oregon was procured to be brought about and said act is now known as Chapter 292 of the Session Laws of Oregon for 1919, and by virtue of an emergency clause attached to said act, the same became effective on the 3rd day of March, 1919, dependent, however, on the State of Washington enacting concurrent legislation to the same effect in accordance with the said compact and agreement existing between the States of Washington and Oregon ratified and confirmed by the act of Congress dated April 8, 1918. "

Par. 9.

Your orator further charges and causes your Honors to be informed and alleges that on or about the 23d day of February, 1915, the Legislative Assembly of the State of Oregon enacted a law known as Chapter 188 of

the Session Laws of Oregon for the year 1915, being a law regulating the taking of salmon from the waters of the Columbia River over which the States of Oregon and Washington have concurrent jurisdiction, and providing for a compact between the States of Oregon and Washington, relative to waters under concurrent jurisdiction of said states and in and by Section 5 of said act among other-things it is provided as follows:

> "No license for taking or catching salmon or other food or shell fish, required by laws of this State, shall be issued to any person who is not a citizen of the United States, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the State for one year or more, immediately preceeding the application of such license, nor shall any license be issued to a corporation unless it is authorized to do business in this State."

And in and by Section 7 of said act, it was provided:

> "That it shall be unlawful for any person to fish or take for sale or profit any salmon, sturgeon or other food fish in any of the rivers or waters over which the states of Oregon and Washington have concurrent rights and concurrent jurisdiction, unless such person be a citizen of the United States, or has declared his intentions, in good faith, to become such, and has been for one year immediately prior to the time he makes application an actual resident of the state in which he seeks to obtain his license."

And thereafter and on or about the 7th day of February, 1917, there was filed with the Secretary of the State of Oregon, Senate Concurrent Resolution Number 7, duly adopted by the Legislative Assemblies of the States of Oregon and Washington.

Par. 10.

That said Chapter 188 was enacted by the Legislative Assembly of the State of Oregon, pursuant to the recommendations of a conference committee of the Legislative Assemblies of the States of Oregon and Washington empowered to draft and submit to the Legislative Assemblies of each of said States, concurrent legislation respecting the taking and catching of salmon from the waters of the Columbia River over which the States of Oregon and Washington have concurrent jurisdiction and thereafter, and on or about the 20th day of February, 1915, the Legislative Assembly of the State of Washington enacted an act known as Chapter 31 of the Session Laws of the State of Washington for 1915, containing the same identical provisions of said section 5 and 7 of said Chapter 188 of the Laws of Oregon for 1915, and permitting persons who have been actual residents of either state for one year in which he seeks to obtain a license and who has in good faith declared his intention to become a citizen to be issued a license to catch salmon in the waters of the Columbia River, and thereafter, pursuant to Section 20 of said Chapter 188, and pursuant to Section 116 of said Chapter 31, the Congress of the United States of America on the 8th day of

April, 1918, enacted a statute ratifying and confirming the agreement, and compact between the States of Oregon and Washington, as provided in said Laws of the State of Oregon and Washington.

Par. 11.

Your orator further causes your Honors to be informed and therefore alleges that the Legislative Assembly of the State of Washington was in session during the month of March, 1919, and during said time a committee of the State of Washington introduced a bill in the Legislative Assembly of the State of Washington, identical or to the same effect as said Chapter 292 for enactment into a law pusuant to the aforesaid compact and treaty existing between the States of Oregon and Washington, and the Legislative Assembly refused and failed to enact such bill and by reason thereof, the said Chapter 292 of the Session Laws of Oregon for 1919 is null and void.

Par. 12.

That on or about the 11th day of February, 1919, the complainant in pursuance of his right to renew the hereinbefore described licenses to fish for salmon in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, in the locations in said waters hereinbefore described, filed a proper application with the Master Fish Warden of the State of Oregon for a renewal of said licenses for the said described locations and tendered the legal fees required therefor.

Par. 13.

Your orator further charges and causes your Honors to be informed and alleges that thereafter and on or about the 17th day of February, 1917, in pursuance of the aforesaid conspiracy and confederation of said respondents, and prior to the passage of said Chapter 292 of the Laws of 1919 by the Legislative Assembly of the State of Washington, the said respondent, Perry Kitzmiller, filed with the Master Fish Warden of the State of Oregon, applications for licenses to fish with set-nets, the locations in the waters of the Columbia River hereinbefore described, for which licenses had been issued to complainant and which cover the same locations for which complainant held licenses as aforesaid.

Par. 14.

Your orator further charges and causes your Honors to be informed that the said respondents, co-operating, confederating and conspiring together so that respondent, Perry Kitzmiller, might obtain the said described fishing licenses and right to fish said described locations in the waters of the Columbia River hereinbefore described, did conceal from the complainant and deliberately led complainant to believe by informing complainant that his licenses would be re-issued to him in due course of business in accordance with his application therefor, and concealed the fact the respondent, Perry Kitzmiller, had applied for licenses for said locations, so that complainant would not take

legal action to protect his rights to fish in the waters of the Columbia River, and thereupon, in pursuance of the aforesaid conspiracy, confederation and scheme of said respondents, the said R. E. Clanton, acting as a de facto officer of the Fish and Game Commission on the 1st day of April, 1919, did issue to the respondent, Perry Kitzmiller, the licenses to fish said described locations in the waters of the Columbia River and rejected and refused to issue complainant licenses to fish said described premises to the irreparable injury and damage of complainant, and said day refused to issue complainant licenses for said described locations, and complainant has thereby been fraudulently deprived of his right to renew said licenses and by reason of the laws of the State of Oregon and the custom and usages thereof, the complainant is entitled to be issued licenses to fish for salmon in the said locations.

Par. 15.

That by reason of the failure of the Legislative Assembly of the State of Washington to enact a similar act of Chapter 292 of the Laws of 1919, or to concur therein, said Chapter 292 of the Laws of Oregon for 1919 is void and ineffective, and the said respondents should be required, by reason of the existing laws of the State of Oregon and established customs in the Office of the Fish and Game Commission to issue the complainant licenses to catch salmon in the waters of the Columbia River in said described locations, and the respondent, Perry Kitzmiller should be required to surrender up and deliver over to the Master Fish

Warden of the State of Oregon, the licenses heretofore issued to respondent on the 1st day of April, 1919, and that the same be cancelled and held for naught.

Par. 16.

That the amount or value in controversy in this suit is in excess of and greater than Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

Par. 17.

For a further and separate cause of suit, your orator causes your Honors to be informed and therefore alleges that the fishing gear and appliances used by complainant in fishing the waters of the Columbia River over which the States of Oregon and Washington have concurrent jurisdiction in the hereinbefore described locations, is a floating gear and gill-net and is not a fixed appliance or stationary fishing gear.

Par. 18.

Forasmuch as your orator is without remedy elsewhere than in equity and has no speedy, plain, adequate or complete remedy at law, and to the end that your Honors may consider of the foregoings facts, matters and things in accordance with equity and good conscience to the full relief of your orator:

May it please your Honors to issue and grant to your orator who now prays a writ of injunction and restraining order pendente lite in accordance with the rules and practices of this court directed against the

respondent, Perry Kitzmiller, his agents, servants, confederates and employees, and those acting by, through or under him from in any manner changing the status in regard to the said described fishing locations and to immediately desist, quit and refrain from fishing said described premises until such time as your Honors shall appoint or direct or may order herein and if upon any hearing had, then that the writ of restraint herein prayed for be held and confirmed until final determination of this suit and thereupon said injunction and restraining order may be made perpetual.

Your orator further prays for a mandatory injunction requiring the respondent, Perry Kitzmiller, to surrender up and deliver to the Master Fish Warden of the State of Oregon the licenses described in the Bill of Complaint, to fish the waters of the Columbia River in the locations herein described; that the Fish and Game Commission of the State of Oregon, the other respondents, and the Master Fish Warden be required by a mandatory injunction to cancel said fishing licenses and to issue to complainant licenses to fish the hereinbefore described locations in the waters of the Columbia River, upon tender of the filing fees required by law.

(Sgd.) CHAS. OLIN.

WM. P. LORD
ARTHUR I. MOULTON
Solicitors for Complainant.

STATE OF OREGON }
County of Multnomah, } ss

I, Charles Olin, being first duly sworn, depose and say that I am the Complainant in the above entitled suit; and that the foregoing Complaint is true, as I verily believe.

(Sgd.) CHAS. OLIN.

Subscribed and sworn to before me this 2nd day of May, 1919.

WM. P. LORD,
Notary Public for the State of Oregon. My Commission expires Dec. 26, 1920.

(Notarial seal)

AND AFTERWARDS, to-wit, on the 22nd day of May, 1919 there was duly FILED in said Court *A Motion of R. E. Clanton, et al to strike out parts of Complaint* in words and figures as follows, to-wit:

MOTION TO STRIKE PARTS OF COMPLAINT

To the Honorable Judges of the above Entitled Court:—

Now come the respondents R. E. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleischner, C. F. Stone, Marion Jack and Frank Warren, above named, and move the court to strike out of complainant's

complaint in the above entitled cause the portions and parts designated and identified as follows, to-wit:

On page 3 in line 9 the word "respondents," and in line 10 "and R. E. Clanton."

On page 4 in lines 6 and 7 the words "the respondents R. E. Clanton and." In line 21 the words "as a de facto officer."

On page 5 in line 9 the words "respondents, R. E. Clanton, and his coadjutor."

On page 7 in line 4 the word "respondents."

On pages 8 and 9 beginning with the words "and so it was" in line 8 on page 8 to and including the words "brought about" in line 20 on page 9.

On page 12 beginning with the words "in pursuance" in line 14, to and including the words "said respondents" in line 15.

Also on pages 12 and 13 beginning at the commencement of line 25 on page 12 to and including the word "respondents" in line 9 of page 13; also in said line 9 the words "a de facto."

The respondents above named base this motion upon the fact that the language and portions of said complaint against which this motion is directed are redundant, impertinant and scandalous.

GEO. M. BROWN,
Attorney-General
I. H. VAN WINKLE,
Assistant Attorney-General.
Solicitors for the Respondents Above Named.

STATE OF OREGON,)
) ss.
County of Multnomah,)

Due and legal service of the within Motion to Strike Parts of Complaint by the receipt of a copy thereof duly prepared and certified by I. H. Van Winkle, one of Attorneys for Respondents, is hereby admitted in said County and State, this 22nd day of May, 1919.

(Sgd.) ARTHUR I. MOULTON
of Attorneys for the Complainant.

AND AFTERWARDS, to-wit, on the 22nd day of May 1919,, there was duly FILED in said Court, *A Motion of R. E. Clanton, et al to Dismiss Bill of Complaint* in words and figures as follows, to-wit:

To the Honorable Judges of the above Entitled Court:—

Now come the respondents R. E. Clanton, Carl Shoemaker, Ben. W. Olcott, I. N. Fleischner, C. F. Stone, Marion Jack and Frank Warren, above named, and move the Court to dismiss the complainant's complaint herein, for the reason that the same does

not state facts sufficient to constitute a cause of suit against said respondents, or any of them.

GEO. M. BROWN,
Attorney-General.
I. H. VAN WINKLE
Assistant Attorney-General.
Solicitors for the Above Named Respondents.

STATE OF OREGON)
) ss.
County of Multnomah)

Due and legal service of the within Motion to Dismiss Complaint by the receipt of a copy thereof duly prepared and certified by I. H. Van Winkle, one of the Attorneys for Respondents, is hereby admitted in said County and State, the 22nd day of May, 1919.

(Sgd.) ARTHUR I. MOULTON
of Attorneys for the Complainant.

AND AFTERWARDS, to-wit, on the 22nd day of May, 1919, there was duly FILED in said Court, *A Motion of Perry Kitzmiller to Dismiss Bill of Complaint* in words and figures as follows, to-wit:

To the Honorable Judges of the above Entitled Court:—

Comes now respondent, Perry Kitzmiller, by W. W. Banks, solicitor for said respondent, and moves the Court to dismiss the complainant's complaint herein upon the ground and for the reason that the same does

not state facts sufficient to constitute a cause of suit against this respondent.

W. W. BANKS,
Solicitor for respondent, Perry Kitzmiller.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF OREGON, } ss.
County of Multnomah.

Due and legal service of the within motion and the receipt of a copy thereof duly prepared and certified by W. W. Banks, one of the attorneys for respondent, Perry Kitzmiller, is hereby admitted at the City of Portland, in said County and State, this 22nd day of May, 1919.

(Sgd.) ARTHUR I. MOULTON
Attorney for Plaintiff.

AND AFTERWARDS, to-wit, on the 19th day of June, 1919, there was duly filed in said Court, *A Motion to Amend Bill of Complaint*, in words and figures as follows, to-wit:

Comes now the complainant and prays an order of the court permitting complainant to amend his complaint on file herein, by adding:

Par. 8a.

That on or about the 29th day of January, 1915, the Twenty-Eighth Legislative Assembly of the State of

Oregon enacted House Concurrent Resolution No. 3, in words and figures as follows:

"BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES, THE SENATE CONCURRING, That a joint committee be appointed, consisting of six members from the House and five members from the Senate, to act with a like committee of the State of Washington for the purpose of conferring on such legislation affecting the fishing industry on the Columbia River as may be of joint interest to the two States, and said committee be allowed the use of one of the regularly appointed clerks or stenographers, and that the chief clerk of the House be instructed to notify the Legislature of the State of Washington of such action."

That pursuant to said Resolution, six members from the House and five members from the Senate of the Legislative Assembly of the State of Oregon, were appointed as members of such committee, whose names are set forth in Exibit A hereof; that at the same time, the Legislative Assembly of the State of Washington, being in session, adopted a like Resolution, and eleven members were selected, whose names are affixed to Exhibit A hereof; that thereafter, the Legislative Assembly of the State of Oregon adopted Senate Concurrent Resolution No. 4, in words and figures as follows:

"WHEREAS, a joint committee consisting of five members of the Senate and six members of the House of the Twenty-eighth Legislative Assembly of the State

of Oregon, was appointed by the President of the Senate and Speaker of the House, respectively, under Joint House Resolution No. 3, to meet a like committee of the Washington Legislature, for the purpose of making such changes in the present concurrent fish legislation on the Columbia River, between the States of Oregon and Washington, as they might deem necessary, and

WHEREAS, the said joint committees between the States of Oregon and Washington did meet in joint session in the City of Portland on the 6th day of February, 1915, and unanimously adopted a report, a copy of which is attached hereto; now therefore, be it

RESOLVED, That the Senate and the House concurring, do hereby ratify and adopt the attached report of your joint committee; and be it further

RESOLVED, That a committee of one from the Senate and one from the House be appointed by the President of the Senate and Speaker of the House, to draft and present a bill embodying the recommendations of this report to this Legislature, at the earliest possible day."

That the report attached to said Senate Concurrent Resolution No. 4, is heretunto attached, marked "Exhibit A" and by this reference made a part of this paragraph; that at the same time, or shortly thereafter, Legislative Assembly of the State of Washington adopted a like Resolution.

WM. P. LORD,
ARTHUR I. MOULTON,
Solicitors for Complainant.

To the Senate and House of Representatives of the States of Washington and Oregon.

We, your Joint Committee, hertofore appointed to confer, concerning legislation, with reference to the fishing industry in the waters and streams over which said states have concurrent rights and jurisdiction, beg leave to submit the following report:

We recommend that all laws, appertaining to commercial fishing, in the waters and streams, over which said States have concurrent rights and concurrent jurisdiction, shall remain unchanged, except in the following particulars, to-wit:

That the Columbia River District shall consist of the waters of the Columbia River, and its tributaries within the confines of the States of Washington and Oregon, where the same are state boundaries.

No fish traps shall be located nor used within three miles below the mouth of Lewis River, but fishing with Gill nets shall be permitted to a point one mile below the mouths of all of said rivers, and one-quarter of a mile out from where the same empty into the main stream.

That it shall be unlawful in the use and operation of a set net to create any artificial eddy, or erect any structure or obstruction for such purpose.

That no license for taking or catching salmon food or shell fish shall be issued to any person who is not a citizen of the United States, unless such person has, in

good faith, declared his intention to become a citizen, and is, and has been an actual resident of the state for one year immediately preceding the application for said license, nor shall any license be issued to a corporation unless it is authorized to do business in the state, where the application for such license shall be made.

That nothing contained in this suggested act shall be construed to prevent the issuance of licenses to women, minors of the age of eighteen or over, or to Indians, providing such applicants possess the qualifications of citizenship, and residence required under the suggested act, nor preventing the renewal of licenses on fixed appliances by persons now holding the same.

That in the event both states shall provide the same qualifications relating to citizenship, and length of residence, in each state, then, and in that event, all gill net licenses, issued by the States of Oregon and Washington shall be valid as to the waters of the Columbia River in the States of Washington and Oregon as though issued by the Fish Commissioners of the States of Oregon and Washington, and in that event, the Department of Fisheries, of each state, or the official who has charge of issuing such licenses, shall furnish to each other the name of the licensee and the number of his license without cost or expense to either state.

That is shall be unlawful for any person to fish or take for sale, or profit any salmon, sturgeon, or other food fish, in any of the rivers or waters over which the

States of Oregon and Washington have concurrent rights, and concurrent jurisdiction, unless such person be a citizen of the United States, or has declared his intention, in good faith, to become such, and has been for one year immediately prior to the time he makes application an actual resident of the state from which he seeks to obtain his license.

We further recommend that each of the states represented in this committee shall provide suitable provisions for testing the qualifications of the applicant making such application.

That all license fees and fines, collected under this provisions of the law suggested, and recommeneded by this report shall be paid into the State Treasury, and be known as the "Fisheries Fund", and that all moneys so collected shall be used for the propagation, protection and perpetuation of the food and shell fishes, and the administration and enforcement of the laws suggested, and recommended in this report.

That we recommend that the license and all other fees shall be, as follows:

For each first-class pound net, or fish trap license, for taking of salmon on the Columbia River.....$25.00

For each second-class pound net or trap, license 15.00

For each stationary fish wheel, license for the taking of salmon..... 35.00

For each scow fish wheel, license for taking of salmon..... 25.00

For each purse-sein, license..... 25.00

And we further suggest that the law suggested shall provide that no purse seins shall be of a greater length than 1750 lineal feet.

For each gill net license for the taking of salmon on the Columbia River, where the same is the boundary between the two states.....$ 7.50

For each drag net license, three cents per lineal foot for each set net license, for the taking of salmon.... 3.75

For each bag net license for taking smelt or herring..... 1.00

For each license to take crabs..... 1.00

For each license to take clams and mussels 1.00

For each wholesale dealer in fish, and for each person engaged in freezing, salting, smoking, kippering, preserving in ice, or otherwise..... 10.00

For each fish broker, not operating as a packer or canner, a license of..... 50.00

For each person using scows, boats or other water craft, in buying handling or transporting food fish, except persons, firms and corporations, operat-

ing canneries, packing or curing establishments that pay an annual license fee to the State of Washington, or the State of Oregon, where the fish are disposed of for canning, curing, preserving or selling within said states, or either of them, a license of..... 1.00

For every person, firm or corporation engaged in canning salmon, shell or other food fish, within the district mantioned, and covered by this report, shall pay the following fees or license, yearly, two cents per case for each case of steel-head, blue-back or sockeye salmon, and one cent for each case of other varieties of salmon, except that he shall pay for each case of Chinook salmon, packed on the Columbia River, prior to the 26th day of August of each year four cents per case, and two cents per case for each case of clams, clam nectar, crabs, shad, shrimp and other food and shell fish, one cent per case.

For each person, firm or corporation using scows, boats, or other water craft, in the buying of fish on the Columbia River, where the same is the boundary between the states hereinbefore mentioned. For each scow or water craft, a license fee of $50.00, which requirement shall not apply to scows, boats, or other water craft used in buying fish for and transporting fish to canneries and packing plants that pay an annual license fee to the State of Washington or the State of Oregon, of not less than $100.00.

That for the purpose of the suggested act, a case of fish shall be defined to consist of forty-eight-one pound cans, or bottles or their equivalent in weight.

For the purpose of this Act, all traps taking fish of the value of $1000.00, or more, shall be considered of the first-class, and all others of the second-class.

Each person, firm or corporation buying, selling or otherwise dealing in salmon and other food or shell fish at wholesale, shall pay to the Fish Commissioner one dollar per gross ton for each ton or fraction thereof, so bought, handled preserved, or cured, during the preceding calendar year.

We further recommend that legislation be enacted, providing that every person, firm or corporation, operating any of the appliances hereinbefore mantioned except gill nets, set nets and tolling lines, in the waters hereinbefore suggested pay to the State for the food and shell fish taken from said waters as follows:

For each one thousand, or fraction thereof, of Chinook salmon, caught in the Columbia River, prior to the 26th day of August, of each year, at the rate of $5.00 per thousand, and for Chinook salmon caught in said river after August 26th, and for Tyee, King, Black or Spring salmon, and black mouth salmon at the rate of $3.00.

For each one thousand or fraction thereof, of sock-eye, blue-back or Quinault salmon at the rate of $1.50 per thousand.

For each one thousand or fraction thereof of silverside or Cohoe salmon, Chum or Fall salmon at the rate of $1.00 per thousand.

For each 100 lbs., or fraction thereof, of smelt, herring, or shad, three cents for each 100 pounds, or fraction thereof, Shrimps fifteen cents.

For each sturgeon, seven and one-half cents.

For each gross of crabs, ten cents.

For each ton of clams, gross weight, in shell, 75 cents.

We further recommend:

That throughout the weekly closed seasons and closed periods, each pound net, or fish trap, shall be closed by an apron placed across the outer entrance to the heart of the trap or pound net, which apron shall extend from above the surface of the water to the bottom of the water, and shall be securely connected between the piles on each side of the heart of said trap or pound net, fastened by rings not more than two feet apart on taut wires, stretched from the top to the bottom of the piles, and such apron shall be provided with such signals as will show that the same is closed.

We further recommend that suitable criminal legislation shall be enacted to provide for the enforcement of the above provision, and that it be made a misdemeanor for any person to violate any of said provisions and upon conviction such party or parties shall be required to pay a substantial fine, not less than $250.00

We further recommend that it shall be made unlawful for any person, firm, or corporation to purchase any food fishes, of any variety, unlawfully taken from the waters hereinbefore mentioned, during any of the closed seasons prescribed, and that any person who purchases any such fish, during said periods, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not less than $100.00.

We further suggest that legislation be provided to the effect that any person, who, by any means whatever, shall catch or take any salmon, or salmon trout, of any variety, less than fouteen inches in length, and shall not immediately return the same alive to the water or who shall buy or sell, or offer for sale, or have in his possession any such fish, shall be guilty of a misdemeanor, and upon conciction shall be fined not less than $50.00 and that it shall be provided, that it shall be unlawful to buy, sell or have in possession any of the food fishes, hereinbefore mentioned, caught or taken in any of the waters hereinbefore mentoined, wherein it shall be unlawful to catch or take the same, and that it shall be unlawful to can or preserve for food any salmon that have been removed from the water for a longer period than sixty hours, unless such fish have been artificially chilled.

We further recommend that it be made unlawful to take or fish for, or have in possession any food fish, of any kind, character or description, unless the same are to be used for food or bait.

That it shall be unlawful for any person, firm or corporation to waste or destroy, salmon or other food fishes, taken or caught in any of the waters hereinbefore mentioned. No person engaged in the canning, preserving or curing of food fish shall purchase or engage a greater quantity of fish than he is able to can, preserve or cure within sixty hours after the same are taken from the water, unless such fish shall be kept artificially chilled.

That it shall be lawful to take, kill, capture or destroy, at any time, in any lawful manner, or to possess or market the Salvelinus mals, commonly known as Dolly Varden or bull trout.

We further recommend that a bounty of $1.00 shall be paid for seal scalps, the same to be paid by the Fish Commissioner, or Fish Warden of the States of Washington or Oregon, or such other official as shall be authorized and directed to pay the same, by the Legislatures of said states, upon proper proof being presented to said official, and the manner of proof to be provided by said Legislatures, and that the sum of $1000.00 shall be appropriated annually by each of said states for the purpose of carrying out said provision.

We further recommend that any person, or persons, shall have the right to take clams, crabs, and mussels in any of the waters hereinbefore mentioned, for the use of such person individually, and for the use of his family or guests, at all times without license.

We further recommend that provisions be made in the law hereinbefore suggested to provide that nothing in the Game Code of either state shall be construed as affecting the commercial fish laws.

In conclusion, we suggest and recommend that a suitable bill, or suitable bills, be drawn immediately to present to the Legislatures of the states hereinbefore mentioned, carrying out the recommendations hereinbefore made, and that said bill, or bills carry an emergency clause so that the same shall be immediately effective as the fishing industry of the states mentioned, will be hindered and injured unless such laws, as we have suggested shall go into immediate effect, and that this report be immediately adopted, by resolution of both houses of each Legislature.

We further recommend that a resolution be passed by the Legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the states of Oregon and Washington shall act as a treaty between said states, subject to modification only by joint agreement of said states.

Respectfully submitted,

I. H. BINGHAM, Chairman

G. E. STEINER, Secretary

Attest:

Wash. members of the Com.	Oregon members of the Com.
J. M. STEVENSON	S. C. COBB

E. A. SIMS	JOHN GILL
A. H. IMUS	C. A. LEINENWEBER
W. A. LOWMAN	R. R. BUTLER
A. C. SLY	J. L. KELLY
E. L. FRENCH	A. A. ANDERSON
J. C. CRAWFORD	T. B. HANLEY
M. C. HARRIS	R. S. FARRELL
W. G. HEIMLY	C. SCHUEBEL
J. W. KLEE	DR. J. C. SMITH.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON ss.

Due and legal service of the within Motion to Amend Complaint is hereby admitted at Portland, Oregon, this 19th day of June, 1919.

W. W. BANKS
Per EJB.
Attorney for Perry Kitzmiller

STATE OF OREGON
County of Multnomah, ss.

I hereby certify that I mailed a copy of the foregoing Motion to I. H. Van Winkle of the Attorney General's Office at Salem, Oregon, this 19th day of June, 1919.

WM. P. LORD.

AND AFTERWARDS, to-wit, on the 23rd day of June, 1919, there was duly FILED in said COURT *An Opinion* in words and figures as follows, to-wit:

This is a suit to compel the Fish and Game Commission of Oregon, and the Master Fish Warden to recall and cancel a license to fish for salmon with set nets in the Columbia River at certain designated places granted to defendant, Kitzmiller, for the year 1919, and to issue such license to complainant. It is alleged in the bill that the complainant is an alien who has declared his intentions to become a citizen and has resided in Oregon since 1889. That for the year 1918, and for several years prior thereto the proper authorities of the State had issued to him annually licenses to take salmon by means of set nets in the Columbia River at certain designated places or locations; that relying thereon, and the usage and custom which had prevailed for many years for the State authorities to renew licenses to the same person for a given location upon application being made therefor, the complainant has expended the sum of $5000 in appliances and apparatus for taking fish, and was earning thereby the sum of $4000 per year. That on February 11, 1919, he duly made application for a renewal of his license for the year 1919, but that defendant, Kitzmiller, an employee of the Fish and Game Commission, becoming advised of the value of complainant's fishing rights and the money which he was deriving therefrom, made application on February 17th, 1919, for a license to fish such localities and entered into a conspiracy with one member of the Fish and Game Commission, the Master Fish

Warden, and the defendant, Clanton, to deprive complianant of his fishing rights, in furtherance of which they induced and persuaded the Legislature of the State to pass an act prohibiting the issuance of licenses to aliens, and thereafter complainant's application was denied on the grounds that he was an alien and a license issued to Kitzmiller for the year 1919.

Defendants moved to dismiss on the ground that the complainant does not state facts sufficient to constitute a cause of suit, principally for the reason that the act of 1919 prohibits issuance of licenses for taking or catching salmon in the Columbia River to persons not citizens of the United States (Laws 1919, page 527).

Although the complainant alleges that this act was procured and induced by fraud and conspiracy of the defendants, the court will not inquire into the motive or influence which prompted its enactment by the Legislature, but only as to its validity (Fletcher vs. Peck, 6 Cranch 87).

In 1915 the States of Oregon and Washington entered into a compact or agreement which was subsequently approved by Congress, that all laws and regulations now existing "or which may be necessary for regulating protecting or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of the said states which would affect said concurrent jurisdiction, shall be made, changed, altered and amended in whole or in part only with the mutual

consent and approbation of both States (Laws 1915, page 233).

At the time this compact became effective the laws of each of the states authorized the issuance of licenses to take salmon in the Columbia River to aliens who had declared their intention to become citizens, and no change in that regard has been concurred in by the State of Washington. It is therefore argued that the act of the Oregon Legislature is void because in violation of the compact or agreement with the State of Washington.

The law is presumed to be valid and will not be otherwise declared by the courts unless clearly so. On the contrary, the courts will endeavor to so construe the law and the compact as to give effect to both, assuming without deciding, that the compact is broad enough to apply to set nets on the Oregon side of the river and within the boundaries of the State. It nevertheless does not appear to me that it limits the right of either state to prescribe the qualifications of persons who shall be licensed to take fish. It is by its terms confined to matters for regulating, protecting, and preserving fish, that is, providing the time and manner of taking fish, the number which may be taken, the apparatus and appliances which may be used and other matters which have a tendency to preserve and protect the fish, none of which are in any way affected by the qualifications of persons who shall be permitted to take fish; the dominant fact to be accomplished by the compact was the protection and preservation of fish, and

this was to be done by laws and regulations of the two states having that object in view.

However, if I am mistaken in this, and the act of 1919 is in violation of the compact, the complainant has no right in court to question same. No vested rights of his were interfered with or impaired by the Legislature. A license to take fish is a privilege granted by the State, and the licensee has no vested right to a renewal of one previously issued.

Motion to dismiss is allowed.

R. S. BEAN
District Judge.

AND AFTERWARDS, to-wit, on the 15th day of December, 1919, there was duly FILED in said COURT *An Order Dismissing Complaint* in words and figures as follows, towit:-

In The District Court of the United States in and for the District of Oregon.

CHARLES OLIN,

Complainant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. OLCOTT, I. N. FLEISCHNER, C. F. STONE, MARION JACK, and FRANK WARREN,

Respondents.

ORDER DISMISSING COMPLAINT

Now, at this time this cause coming on to be heard on the motions of the defendants for an order dismissing complainant's complaint, complainant appearing by William P. Lord, his attorney, and respondents appearing by their respective attorneys, I. H. Van Winkle and W. W. Banks, and the court having heard the arguments of counsel, and being fully advised in the premises;

IT IS HEREBY ORDERED that the complaint filed herein by complainant be and the same is hereby dismissed.

Dated at Portland, Oregon, this 23rd day of June, 1919.

(Signed) R. S. BEAN, Judge.

AND AFTERWARDS, to-wit, on the 15th day of December, 1919, there was duly FILED in said COURT *A Petition for Appeal* in words and figures as follows, to-wit:

The complainant above named, conceiving himself aggrieved by the decree made and rendered in the above entitled court in the above entitled cause, and entered therein on the 23rd day of June, 1919, at the regular March term of said court in favor of the respondents in the above entitled cause, and against the said complainant therein, wherein and whereby it was, and is ordered, adjudged, and decreed that the bill of complaint herein be, and the same was dismissed, does hereby

appeal from the said order and decree, and from the whole and from each and every part thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit.

And the said complainant files herewith his ASSIGNMENTS OF ERRORS, asserted, and intended to be urged by him upon this his said appeal.

And the said complainant prays that this, his petition for said appeal, and his said appeal may be granted and allowed, and that CITATION issue herein as provided by law, and that a transcript of the record, and proceedings and papers upon which the said decree was so made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and also that an order be made fixing the amount of security or bond, which the said complainant shall give and furnish upon this his appeal.

CHAS. OLIN,
Complainant and Appellant.

WM. P. LORD

ARTHUR I. MOULTON,
Solicitors for Complainant.

The appeal prayed for in the foregoing petition is hereby allowed, and complainant's undertaking on appeal is hereby fixed in the sum of Five Hundred ($500.00) Dollars.

Dated this 15th day of December, 1919.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON, } ss.
County of Multnomah.

Due and legal service of the within petition for an appeal and receipt of a certified copy thereof is hereby admitted at Portland, Oregon, this 15th day of December, 1919.

W. W. BANKS,
Attorney for Respondent Perry Kitzmiller

GEORGE G. BROWN,
Attorney General, of the State of Oregon,
By JNO. O. BAILEY,
Assistant Attorney General. Attorney for R. C. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleischner, C. F. Stone, Marion Jack, and Frank Warren. Constituting the board of Fish and Game Commissioners for the State of Oregon.

AND AFTERWARDS, to-wit, on the 15th day of December, 1919, there was duly FILED in said COURT

An Assignment of Errors, in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon

CHARLES OLIN,

Complainant and Appellant.

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. OLCOTT, I. N. FLEISCHNER, C. F. STONE, MARION JACK, and FRANK WARREN.

Respondents and Appellees.

ASSIGNMENT OF ERRORS

The complainant above named complains of the order and decree made and rendered in the above entitled court in the above entitled cause, and entered therein, as alleged in his petition for an appeal therefrom, and now says that the decree in said cause is erroneous, and against the just rights of said complainant, and there is manifest error, and for error the said complainant assigns as hereinafter setforth, and in the prosecution of said appeal he will assert and rely upon the following ASSIGNMENT OF ERRORS:

I

The District Court of the United States for the District of Oregon erred in sustaining the separate motions of the respondent Perry Kitzmiller, and the respondents R. C. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleischner, C. F. Stone, Marion Jack, and

Frank Warren, to dismiss complainants bill of complaint, and in not holding that by the admissions made by said respondents in said motion to dismiss that complainant was not entitled to the relief prayed for in his complaint.

II

The said court erred in making and entering an order and decree dismissing complainant's bill of complaint.

III

The said court erred in not holding that Oregon Laws, 1919, Chapter 292, was not void as an impairment of the contract and agreement between the States of Oregon and Washington.

IV

That said court erred in holding that it could not inquire into the motives or influence which prompted the Oregon Act known and described as Chapter 292, Oregon Laws, 1919.

V

The said court erred in holding that the complainant derived no rights under the compact between the States of Oregon and Washington to fish for salmon in the waters of the Columbia River, and which compact was ratified by the congress of the United States by the Act of April 8, 1918 (Federal Statutes Annotated 1918, Supp. 179.)

VI

The court erred in not holding that the usage and custom which had prevailed for many years for the Oregon Fish and Game Commission to renew licenses to the same person for a given location upon application being made therefore, did not vest in complainant a right of priority to the locations for Salmon Fishing in the waters of the Columbia River, and that he had a vested and property right therein, and that said Chapter 292, Oregon Laws, 1919, interferred with anp impaired complainant's said fishing rights.

VII

The court erred in not holding that Chapter 181, Oregon Laws, 1915, conferred upon and protected complainant's right to priority to fish for salmon in the same locations.

VIII

The court erred in holding that without the consent of the State of Washington, the State of Oregon could prescribe different qualifications of persons who should be licensed to fish for salmon in the waters of the Columbia River.

WHEREFORE complainant prays that the said order and decree dismissing complainant's bill of complaint be reversed and held for naught, and that complainant may have such other relief as may be in

conformity with the law, and the practice of this court, and as may be proper in the premises.

WM. P. LORD
ARTHUR I. MOULTON
Solicitors for Complainant and Appellant.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON,
County of Multnomah. } ss.

Due service of the within citation is hereby admitted in Multnomah County, Oregon, this 15th day of December, 1919.

W. W. BANKS,
Attorney for respondent Perry Kitzmiller.

GEORGE M. BROWN,
Attorney General for the State of Oregon.

By JNO. O. BAILEY,
Assistant Attorney General,

Attorneys for R. C. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleischner, C. F. Stone, Marion Jack, and Frank Warren, constituting the board of Fish and Game Commissioners for the State of Oregon.

AND AFTERWARDS, to-wit, on the 15th day of December, 1919, there was duly FILED in said COURT

An Undertaking on Appeal in words and figures as follows, to-wit:

In The District Court of the United States in and for the District of Oregon

CHARLES OLIN,

Complainant, and Appellant.

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. OLCOTT, I. N. FLEISCHNER, C. F. STONE, MARION JACK, and FRANK WARREN.

Respondents and Appellees.

UNDERTAKING ON APPEAL

KNOW ALL MEN BY THESE PRESENTS: That I, Charles Olin, as principal, and Herbert A. Holmes as surety, are held and firmly bound unto the above named respondents in the full sum of Five Hundred ($500.00) Dollars, to the payment of which sum, well and truly to be made unto the said respondents, we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated the 15th day of December, 1919.

WHEREAS, lately at a term and session of the District Court of the United States, for the District of Oregon, held in the city of Portland, Oregon, on the 23rd day of June, 1919, in a suit then pending in said court, wherein Charles Olin was complainant, and the above named respondents, constituting the State Board of Fish and Game Commissioners were parties respondent, a judgement and decree was rendered and entered in this cause in favor of said respondents, and against said complainant, wherein, and whereby it was and is, ordered, adjudged, and decreed that the bill of complaint herein be, and the same was thereby dismissed, and no costs and disbursements being taxed or allowed by the court.

AND WHEREAS, the said complainant has prosecuted, and is now prosecuting as appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the said judgement and decree, so made and entered.

NOW THEREFORE, the condition of this obligation is such that if said complainant shall prosecute his said appeal to effect, and answer all damages and costs, if he fail to make his said plea good, then this obligation shallbe void, otherwise the same shall be and remain in full force and effect.

CHARLES OLIN,
Complainant and Principal.
H. A. HOLMES,
Surety.

This bond is approved as to form, and amount of sureties, this 15th day of December, 1919.

CHARLES E. WOLVERTON
United States District Judge.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON,
County of Multnomah. } ss.

I, Herbert A. Holmes, being first duly sworn: depose and say, that I am a resident, householder, and freeholder within the State of Oregon, and am worth the sum of $1000.00 in property situated within the State of Oregon, over and above all my debts and liabilities and exclusive of property exempt from execution, and am not an attorney at law, sheriff, clerk, or officer of any court.

H. A. HOLMES.

Subscribed and sworn to before me this 15th day of December, 1919.

J. A. MOULTON,
Notary Public for Oregon.

My commission expires March 31, 1920.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON, °
County of Multnomah. } ss.

Due and legal service of the within bond is hereby admitted this 15th day of December, 1919.

W. W. BANKS,
Attorney for Appellee, Perry Kitzmiller.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON, } ss.
County of Multnomah.

Due service of the within bond is hereby admitted this 15th day of December, 1919.

GEORGE BROWN,
Attorney General State of Oregon by
J. O. BAILEY,
Assistant Attorney General.
Attorney for Appellees, R. C. Clanton Carl Shoemaker, Ben W. Olcott, I. N. Fleishner, C. E. Stone, Marion Jack and Frank Warren, constituting the Oregon State Fish and Game Commission.

In The District Court of the United States in and for The District of Oregon

CHARLES OLIN,
Complainant and Appellant.
vs.
PERRY KITZMILLER, R. C. CLANTON,
CARL SHOEMAKER, BEN W. OLCOTT,
I. N. FLEISHNER, C. F. STONE,
MARION JACK, and FRANK WARREN.
Respondents and Appellees.

STIPULATION:

It is hereby stipulated and agreed by and between the parties above named in the above entitled suit, thro ugh their respective attorneys, that the printed transcript of record in the above entitled cause, as printed by the complainant and tendered to the clerk for his certificate, is a true transcript of the record in the cause, and that the clerk shall certify the said printed transcript in accordance with this stipulation without comparison with the original record.

Dated this 20th day of December, 1919.

WM. P. LORD,
ARTHUR I. MOULTON
Solicitors for Complainant and Appellee.

GEORGE BROWN,
Attorney General of the State of Oregon.
I. H. VAN WINKLE,
Assistant Attorney General,
Solicitor for R. C. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Frank Warren.

W. W. BANKS,
Solicitor for Perry Kitzmiller.

UNITED STATES OF AMERICA,
District of Oregon, } ss.

I, G. H. Marsh, Clerk of the District Court of the United States, District of Oregon, do hereby certify that the foregoing printed record was tendered to me as Clerk for certification as a true transcript of the record in the case of Charles Olin vs. Perry Kitzmiller, R. C. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleishner, C. F. Stone, Marion Jack and Frank Warren, and I hereby certify that the foregoing printed Transcript of Record is in accordance with the stipulation of the parties herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at Portland, this 15th day of January, 1920.

Clerk of the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
District of Oregon, ss:

Due and legal service of the within transcript of record by duly certified copy as per stipulation herein set forth on page 58 hereof is hereby admitted in Portland, Oregon this 19th day of January, 1920.

GEORGE M. BROWN,
Attorney-General of the State of Oregon,
(Sgd.) By J. O. BAILEY,
Assistant Attorney-General.
(Sgd.) W. W. BANKS,
Solicitor for Perry Kitzmiller.

[Endorsed:] Printed Transcript of Record. Filed January 21, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3438.

CHARLES OLIN, Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Frank Warren, Appellees.

Upon Appeal from the District Court of the United States for the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Names and Addresses of Attorneys of Record.

Wm. P. Lord and Arthur I. Moulton, Lewis Building, Portland, Oregon, Counsel for Appellant.

I. H. Van Winkle, Attorney General for the State of Oregon, Salem, Oregon, Counsel for all of Appellees but Perry Kitzmiller.

W. W. Banks, Yeon Building, Portland, Oregon, Counsel for Perry Kitzmiller.

At a Stated Term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the Fifth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable Erskine M. Ross, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

No. 3438.

CHARLES OLIN, Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Frank Warren, Appellees.

Order of Submission.

Ordered appeal in the above entitled cause argued by Mr. William P. Lord, counsel for the appellant, and by Messrs. Millar E. Mc-Gilchrist and W. W. Banks, counsel for the appellees, and submitted to the Court for consideration and decision, with leave to counsel for the appellant to file a supplemental brief within twenty (20) days from date.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Eleventh Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable William W. Morrow, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the causes were heard, Ordered that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the Clerk, and that a Judgment or Decree be filed and recorded in the Minutes of this Court in each of the said causes in accordance with the Opinion filed therein: * * *

No. 3438.

CHARLES OLIN, Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN Olcott, I. N. Fleishner, C. F. Stone, Marion Jack and Frank W ren, Appellees.

United States Circuit Court of Appeals for the Ninth Circuit

No. 3438.

CHARLES OLIN, Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN Olcott, I. N. Fleischner, C. F. Stone, Marion Jack and Frank W ren, Appellees.

Wm. P. Lord and Arthur I. Moulton, for the Appellant.
George M. Brown, Attorney General, and I. H. Van Win Assistant Attorney General, for the Appellees except Kitzmiller.
W. W. Banks, for Appellee Kitzmiller.
L. A. Liljeqvist, of Counsel.

Before Gilbert, Ross, and Hunt, Circuit Judges.

GILBERT, *Circuit Judge:*

In the year 1915 the legislatures of the states of Oregon and W ington entered into a compact and agreement expressed as foll "All laws and regulations now existing, or which may be neces for regulating, protecting, or preserving fish in the waters o Columbia River, over which the states of Oregon and Washing have concurrent jurisdiction, or any other waters within eithe said states which would affect said concurrent jurisdiction, sha made, changed, altered and amended, in whole or in part, only the mutual consent and approbation of both states." On Apr 1918 the compact was ratified by Congress, 40 Stat. 515. At the when the compact was entered into the laws of both states authori the issuance of licenses to take salmon in the Columbia Rive resident aliens who had declared their intention to become citi of the United States. In the year 1919 the legislature of Ore amended its law and provided that no license for taking or catc salmon or other food or shell fish, required by the laws of the "shall be issued to any person who is not a citizen of the Un States." The legislature of the State of Washington has enacte similar provision. The appellant, who is an alien, but who in declared his intention to become a citizen, contends that the Or

w of 1919 is void in that it violates the provisions of the compact
ween the two states.

We pass by the question whether by entering into the compact
ther state has divested itself of power to withdraw therefrom
to enact laws in derogation thereof without the assent of the other—
question which is not reached by the authorities cited by the ap-
llant—and confine our inquiry to the question whether the amend-
ent of 1919 is prohibited by the terms of the compact. From the
nguage used it is clear that the contracting parties did not intend
divest either state of all power to enact without the other's con-
nt legislation over the subject which was embraced therein. They
t the legislature of each state free to enact any law on the sub-
t of the regulation and protection of fishing which would not
fect the jurisdiction of the other state in the waters over which
eir jurisdiction was concurrent. A law which prescribes the quali-
ation of a licensee by either state is clearly not a law which affects
e concurrent jurisdiction. A law of Oregon which declares that
ch a license shall issue in that state only to residents and citizens
reof cannot come in conflict with a law or regulation of Wash-
gton under which a license may there be issued to a resident alien
o has declared his intention to become a citizen, nor can it, in any
nceivable way, affect the rights of citizens or residents of the latter
te. Each state has the power to deal with the question of the right
its own subjects to take fish in the waters which are subject to the
ncurrent jurisdiction. It is only as to its common right with the
joining state to take fish from those waters that its right is limited
the compact. Many conceivable regulations would be within
prohibition of the compact. Thus, one state without the consent
the other may not change the open and closed seasons, may not
scribe the manner of taking fish, the number permitted to be
en, or the permissible fishing gear and appliances. All such
tters affect the concurrent jurisdiction. It is not so with the
ignation of the qualifications of the licensees of either state to
in the waters to which the concurrent jurisdiction extends.

The appellant asserted in his bill a preferential right to the is-
nce of a license to fish with set nets for salmon in the Columbia
er at certain designated places, which right had been accorded him
several years consecutively, and he alleged that the appellee Kitz-
ller had entered into a conspiracy with the Fish and Game Warden
others to deprive him of his fishing rights, in furtherance of
ch they induced and persuaded the legislature of Oregon to
t the amendment of 1919. No ground for equitable relief is
d in these facts. It is not within the province of the judiciary
nquire into the motives of a legislature in enacting a statute.
Stoppenbach v. Multnomah County, 71 Or. 509; Calder v.
Michigan, 218 U. S. 591; McGray v. United States, 195 U.
S. 27, 53-59; United States v. Des Moines &c. Co., 142 U. S.
510, 545.

he decree dismissing the bill for want of equity is affirmed.

[Endorsed:] Opinion. Filed October 11, 1920, F. D. Monckton Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3438.

CHARLES OLIN, Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Fran Warren, Appellees.

Decree.

Appeal from the District Court of the United States for the Distr of Oregon.

This Cause came on to be heard on the Transcript of the Reco from the District Court of the United States for the District of Or gon and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, an decreed by this Court that the decree of the said District Court i this cause be, and hereby is affirmed, with costs in favor of the a pellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, th the appellees recover against the appellant for their costs herein e pended, and have execution therefor.

[Endorsed:] Decree. Filed and Entered October 11, 1920, F. Monckton, clerk by Paul P. O'Brien, deputy clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3438.

CHARLES OLIN, Complainant-Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Frank Wa ren, Respondents-Appellees.

Petition for Appeal.

The above mentioned appellant, Charles Olin, respectfully sh that the above entitled cause is now pending in the United St Circuit Court of Appeals for the Ninth Circuit, and that a decree therein been entered on the 11th day of October, 1920, affirm

the decree of the District Court of the United States for the District of Oregon, and that the matter in controversy in said suit exceeds $1,000.00, besides costs; that this cause is one in which the United States Circuit Court of Appeals has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on Appeal.

Wherefore said appellant prays that an appeal be allowed in the above entitled cause, directing the Clerk of the Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

(Sgd.) JAMES E. FENTON,
(Sgd.) WM. P. LORD,
(Sgd.) ARTHUR I. MOULTON,
Solicitors for Appellant.

UNITED STATES OF AMERICA,
District of Oregon, ss:

Service of the foregoing Petition for Appeal by copy is hereby admitted in said District this 5th day of January, 1921.

(Sgd.) I. H. VAN WINKLE,
Attorney-General, State of Oregon,
for All Appellees Except Perry Kitzmiller.
(Sgd.) W. W. BANKS,
Solicitor for Appellee Kitzmiller.

[Endorsed:] Petition for Appeal to Supreme Court U. S. Filed January 8, 1921. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3438.

CHARLES OLIN, Complainant-Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. OLCOTT, I. N. FLEISHNER, C. F. STONE, MARION JACK, and FRANK WARREN, Respondents-Appellees.

Assignment of Errors.

The appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files therewith his assignment of errors, as to which matters and things he says that the decree

entered herein on the 11th day of October, 1920, is erroneous, to-wit:

1. Said Court erred in affirming the decree of the District Court for the District of Oregon, and dismissing the appeal of complainant for want of equity.

2. In holding that the compact and treaty between the States of Oregon and Washington, Oregon Laws 1915, Chapter 188; Washington Laws 1915, Chapter 31, ratified by Act of Congress, 40 Stat. 515, did not create a preferential right in the appellant to renew licenses previously issued by the state authorities of Oregon to fish the locations described.

3. In not holding and deciding that Oregon Laws 1919, Chapter 292 is void, and impairs the obligations of the compact and treaty between the States of Oregon and Washington, and impairs preferential rights vested in appellant by the provisions of said compact.

4. The Court erred in not holding that without the consent of the State of Washington, the State of Oregon could, by subsequent law prescribe different qualifications for the holders of fishing licenses than fixed by the compact between the two states.

5. In deciding that the Act of Congress, 40 Stat., 515, contains the compact, and that the compact is not found in the concurrent Laws of the State referred to in the second assignment of error herein, and in Oregon House Concurrent Resolution adopted on the 29th day of January, 1915, ratifying the Report of the joint committee of the two states agreeing upon legislation.

6. In construing the compact to the effect that qualifications of persons applying for license in respect to residence and status as to citizenship was not a law which affected the concurrent jurisdiction, and in not holding that the clause, "which would affect said concurrent jurisdiction," used in the Act of Congress ratifying the compact, refers to the, "or any other waters within either of said states" used in said Act.

7. The Court erred in holding that it could not inquire into the motives and influences which prompted the enactment of Oregon Laws 1919, Chapter 292.

8. The Court erred in not holding that by virtue of the use and custom and laws adopted declaratory thereof for the Oregon Fish and Game Commission to renew fishing licenses to the same person for a given location upon application being made thereto did not vest in appellant a right of priority to the locations for said fishing in the waters of the Columbia River, and that he had a vested and property right therein, and that said Chapter 292, Oregon Laws 1919, interfered with and impaired complainant-Appellant's said fishing rights in violation of Federal guaranties.

9. The Court erred in not holding that Chapter 188, Oregon Laws 1915, and Oregon Laws 1913, Chapter 128, vested a right of priority

and created a contingent vested right until a change made by joint legislation of the two states, to fish for salmon in the described locations.

Wherefore said appellant prays the Honorable Court to examine and correct the errors assigned and for a reversal of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled case.

(Sgd.) JAS. E. FENTON,
(Sgd.) WM. P. LORD,
(Sgd.) ARTHUR I. MOULTON,
Solicitors for Appellant.

UNITED STATES OF AMERICA,
District of Oregon, ss:

Service of the foregoing Assignment of Errors, by copy admitted this 5th day of January, 1921.

——— ———,
Attorney General, State of Oregon,
for All Appellees Except Kitzmiller.
(Sgd.) W. W. BANKS,
Solicitor for Perry Kitzmiller.

[Endorsed:] Assignment of Errors on Appeal to Supreme Court U. S. Filed January 8, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES OLIN, Complainant-Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. Olcott, I. N. Fleishner, C. F. Stone, Marion Jack and Frank Warren, Respondents-Appellees.

Affidavit as to Amount in Controversy.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, Charles Olin, being first duly sworn, on oath, depose and say that I am the appellant in this cause; that the value of the right to fish the locations for salmon in the waters of the Columbia River, as described in paragraph VI of complainant's complaint, is more than the sum of $3,000.00 and is more than the sum of $2,000.00 per year, in excess of expenses connected with fishing said locations, and that therefore the matters referred to are in controversy in this suit, and the amounts so in controversy exceeds the sum of $5,000.00, exclusive of costs.

(Sgd.) CHAS. OLIN.

Subscribed and sworn to before me this 5th day of January, 192
[SEAL.] (Sgd.) WM. P. LORD,
Notary Public for Oregon

My Commission Expires 29 December, 1924.

UNITED STATES OF AMERICA,
District of Oregon, ss:

Service of the foregoing Affidavit by copy is hereby admitted
said District this 5th day of January, 1921.

____ ____,
Attorney-General, State of Oregon,
for All Appellees Except Kitzmiller
(Sgd.) W. W. BANKS,
Solicitor for Perry Kitzmiller

[Endorsed:] Affidavit to Amount in Controversy. Filed Janua
8, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Cle

United States Circuit Court of Appeals for the Ninth Circui

No. 3438.

CHARLES OLIN, Complainant-Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, Bev
Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Frank W
ren, Respondents-Appellees.

Order Allowing Appeal.

It is hereby ordered that the appeal in the above entitled
to the Supreme Court of the United States be and is hereby all
as prayed.

Dated this 8th day of January, 1921.

(Sgd.) W. H. HUNT,
United States Circuit Judge
for the Ninth Circ

[Endorsed:] Order Allowing Appeal to Supreme Court U
Filed January 8, 1921. F. D. Monckton, Clerk, by Paul P. O'Br
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3438.

CHARLES OLIN, Complainant-Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Frank Warren, Respondents-Appellees.

Bond on Appeal.

Know all men by these presents: That we, Charles Olin, of Hood River County, State of Oregon, and H. A. Holmes, of Multnomah County, State of Oregon, are held and firmly bound unto the above named appellees in the sum of $500.00, to be paid to the said appellees; we bind ourselves and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 5th day of January, 1921.

Whereas the appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Ninth Circuit on the 11th day of October, 1920.

Now, therefore, the condition of this obligation is such that if said appellant shall prosecute said appeal to effect and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

(Sgd.) CHAS. OLIN,
Principal.

(Sgd.) H. A. HOLMES,
Surety.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, H. A. Holmes, the surety named in the foregoing bond, being first duly sworn, depose and say that I am a resident and freeholder of the County of Multnomah, State of Oregon, and am worth the sum of one thousand ($1,000.00) dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(Sgd.) H. A. HOLMES.

Subscribed and sworn to before me this 5th day of January, 1921.

(Sgd.) WM. P. LORD,
[SEAL.] *Notary Public for Oregon.*

My Commission Expires 29 December, 1924.

The foregoing bond is approved this 5th day of January, 1921.

(Sgd.) I. H. VAN WINKLE,
Attorney-General, State of Oregon.

(Sgd.) W. W. BANKS,
Solicitor for Kitzmiller.

The foregoing bond is approved this 8th day of January, 1921.

(Sgd.) W. H. HUNT,
United States Circuit Judge for the Ninth Circuit.

[Endorsed:] Bond on appeal to Supreme Court U. S. Filed January 8, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3438.

CHARLES OLIN, Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, BEN W. Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Frank Warren, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-nine (79) pages, numbered from and including 1 to and including 79, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of January, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk.

By PAUL P. O'BRIEN,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Perry Kitzmiller, R. C. Clanton, Carl Shoemaker, Ben W. Olcott, I. N. Fleishner, C. F. Stone, Marion Jack, and Frank Warren, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the City of Washington, in the District of Columbia, within sixty (60) days from date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Charles Olin is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, filed and entered on the eleventh day of October, A. D. 1920, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Hunt, United States Circuit Judge for the Ninth Judicial Circuit, this 8th day of January, A. D. 1921.

W. H. HUNT,
United States Circuit Judge.

UNITED STATES OF AMERICA,
District of Oregon, ss:

Due and legal service of the foregoing citation is hereby admitted this 18th day January, 1921.

W. W. BANKS,
Solicitor for Respondent Perry Kitzmiller.
I. H. VAN WINKLE,
Attorney-General, State of Oregon,
Solicitor for Other Respondents.

[Endorsed:] No. 3438. United States Circuit Court of Appeals for the Ninth Circuit. Charles Olin, Appellant, vs. Perry Kitzmiller, Appellees. Citation on appeal. Filed Jan. 24, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

Endorsed on cover: File No. 28,143. U. S. Circuit Court Appeals, 9th Circuit. Term No. 786. Charles Olin, appellant, vs. Perry Kitzmiller, R. C. Clanton, Carl Shoemaker, et al. Filed March 7th, 1921. File No. 28,143.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1920

No. [redacted]246

CHARLES OLIN,

Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, et al,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

Filed March 7, 1921.
(28,143)

PRESS OF THE ARCADY COMPANY, PORTLAND, OREGON

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1920

No. 786

CHARLES OLIN,

Appellant,

vs.

PERRY KITZMILLER, R. C. CLANTON, CARL SHOEMAKER, et al,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

Filed March 7, 1921.
(28,143)

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

WM. P. LORD,
Board of Trade Building, Portland, Oregon.

ARTHUR I. MOULTON,
Board of Trade Building, Portland, Oregon.

JAMES E. FENTON,
Van Nuys Building, Los Angeles, California.
Court Building, Salem, Oregon.
Attorneys for Appellant.

I. H. VAN WINKLE,
Attorney General for the State of Oregon, Supreme
Attorneys for Appellees,
except Perry Kitzmiller.

W. W. BANKS,
Yeon Building, Portland, Oregon.
Attorney for Appellee,
Perry Kitzmiller.

SUBJECT INDEX

INDEX TO CASES CITED

INDEX TO LAWS, ACTS, ETC. CITED.

STATEMENT OF FACTS

This appeal comes upon a motion to dismiss a bill in equity to require the Board of Fish and Game Commissioners of the State of Oregon to recall and cancel certain described setnet licenses issued to respondent Perry Kitzmiller for the year 1919, to fish for salmon in the waters of the Columbia River, at certain described fishing locations, and to compel by a mandatory injunction directed to the Board and to the master fish warden, to re-issue such licenses to the complainant.

It was claimed by the appellant that under the provisions of a compact between the States of Oregon and Washington, relative to fishing for salmon in the Columbia River, entered into in the year 1915, and under the terms of Chapter 188, Oregon Laws, 1915, and the interpretation placed on the fishing laws of the State of Oregon, by the Fish Commissioners and by the Courts of Oregon, and by custom and usage, that the appellant had a vested right to a renewal of the licenses in question for each succeeding year and until a change was made by valid legislative enactment, and that this compact granted and fixed appellant's rights by a provision that aliens who had resided in either state for one year, and who had declared their intention to become a citizen were qualified applicants for fishing licenses, and that a subsequent law of Oregon, enacted in the year 1919, not concurred in by the State of Washington, providing that only citizens should be issued licenses to fish for salmon with fixed appliances, under which the Board refused

to issue licenses to appellant, was void as impairing the compact between the two states, and, therefore, the action of the Board was arbitrary. The District Court held that the appellant had no vested right to a renewal of a license previously issued, and that the compact did not limit the right of either state to prescribe the qualifications of persons who shall be licensed to take fish (Transcript, page 43). The case was appealed to the Circuit Court of Appeals for the Ninth Circuit, and it was held by this Court in an opinion by Judge Gilbert, that the compact between the two states was found in Section 20, Chapter 188, of Oregon Laws 1915, and that the provisions of the Oregon Laws of 1919, Chapter 292, changing the qualifications of fishermen, not concurred in by Washington, was not a law to which the concurrent jurisdiction extends.

The bill charges that the complainant is a resident alien, who has declared his intention to become a citizen of the United States. He came to the United States in 1889, and now resides in Cascade Locks with his family, where he has been engaged for many years in the occupation of fishing for salmon in the waters of the Columbia River by means of fishing gear known as setnets at the locations for which licenses are sought. During the month of March, 1892, the complainant filed with the County Clerk of Multnomah County, Oregon, a declaration of his intention to become a citizen, and subsequently upon his application, an order was granted by the Court, extending the time to perfect his second papers, and on the 9th day of March, 1919, his applica-

tion to become a citizen was in full force and effect. Since instituting such naturalization proceedings, he moved himself and family to Hood River County, and applied to the County Clerk of that County for his second papers. By a misprision of the Clerk in making out this application for second papers, the date of the complainant's original application to become a citizen, and not the date as extended was inserted, and by reason of this fact, there was existing a discrepancy which caused a doubt as to the legality of his naturalization proceedings and under the advice of the naturalization authorities on the 9th day of March 1918, he filed a new declaration to become a citizen. This defect it is alleged delayed the granting of final papers.

The laws of Oregon have for many years required a license to fish for salmon, and as a qualification, that the applicant for a license must be a resident of the State for a fixed period, and have declared his intention to become a citizen. Chapter 188 of the Laws of 1915, Sections 5 and 7, embodied the same requirement; the material parts of the statute are printed in the appendix to this brief.

Under the provisions of this statute the complainant was a qualified applicant for a license, and had been issued setnet licenses to fish for salmon by the Fish Commissioners for each succeeding year for the same locations in the waters of the Columbia River until the year 1919. He had made a large investment in fishing appliances, and had fished these locations for many years, at

which he earned an income of more than $4,000 per year. On the 11th day of February, 1919, he duly made application to the Master Fish Warden for setnet licenses to fish for salmon for the same locations. His status as to residence and citizenship were the same as in preceeding years. The licenses under the law are good for one year, under the act referred to, and do not expire until the 31st day of March each year.

The State of Oregon maintains a fish hatchery for the propagation of salmon and other food fish at Bonneville on the banks of the Columbia River near the locations for which complainant's licenses had been previously issued. The respondent Clanton had charge of this hatchery for several years, and during the years 1918 and 1919, he was in charge thereof, and the respondent Kitzmiller was employed at the same hatchery and under the control of Mr. Clanton. On the 17th day of February, 1919, Kitzmiller made application to the Master Fish Warden, who was Respondent Clanton, for setnet licenses to fish the same locations for which licenses had been previously issued to the complainant. Complainant's licenses for the year 1918-1919 had not expired at the time. The Master Fish Warden, having the two applications under consideration, on the 31st day of March, 1919, the day upon which complainant's licenses expired, rejected the application of complainant, and issued the licenses for the locations to respondent Kitzmiller.

The complainant immediately instituted this suit to

cancel the licenses issued to respondent Kitzmiller, and to compel the licenses to be issued to him on the grounds that the action of the Fish and Game Commissioners in rejecting his application was arbitrary and was brought about by a conspiracy of respondent Kitzmiller and members of the Board and the Master Fish Warden to deprive him of the licences, and grant them to Kitzmiller.

It is charged in the bill of complaint that the laws of the state of Oregon recognize a right in a person to whom has been issued a license to fish for salmon in certain locations, in the waters of the Columbia River whose qualifications remain the same at the time the license was issued, to have the licenses renewed for the following year, if proper application was made to the Master Fish Warden before the expiration of the existing license. The complainant, in paragraph 5 of the bill, (printed on page 12 of the Transcript), charges that the administrative officers have recognized a usage and custom in respect to a renewal of a license to fish for salmon with fixed appliances, and that the Act of 1915, Chapter 188, and the compact between the two states contained provisions declaratory of this custom and usage.

It is contended that Chapter 128 of Oregon Laws for 1913 and Sections 2, 3, 5, 8, and sub-div. E of Section 8 of Chapter 188 Oregon Laws for 1915 and corresponding laws of the State of Washington are declaratory of this right, as well as by the decision of the Supreme Court of the State of Oregon in the case of Hume

v. Rogue River Packing Company, 51 Or., 257-260, and particularly on page 260, and the case of William vs. Seufert Bros., 96 Or., 163, where the act of 1915 is construed by the Supreme Court, and held to grant a right of priority to renew a license to fish with a fixed appliance. Section 2 of this last act provided that the failure to renew the license or make application therefor for any fish trap, pound net, fish wheel or location for other fixed appliance, in any of the waters of this state on the 1st day of April of any year, shall constitute abandonment of the location. And section 5 provided that nothing therein contained shall be construed to prevent the issuance of licenses to women, etc., nor to prevent the renewal of licenses for fixed appliances by persons now holding the same. The act of 1913 referred to expressly protected the rights of existing priorities for a renewal of licenses to catch salmon with setnet and other fixed appliances. The rights of citizens and persons possessing the qualifications to fish in the navigable waters of the state is a free and common right to all persons possessing the requisite qualifications, is recognized by the decisions of the highest court of the state and is considered a property right.

The bill of complaint further sets out that respondents Kitzmiller and Clanton some time prior to the 17th day of February, 1919, became informed of the great value of the fishing locations, for which complainant had been issued licenses, and the money which could be derived from fishing the locations, and set about ways and means to secure the issuance of the licenses to Kitz-

miller to fish the locations for which licenses had been previously issued to complainant. That they recognized that under the existing laws of Oregon which is Chapter 188 of the Laws of 1915, and the practice and custom followed by the state authorities, before adverted to, that upon proper application being made therefor by the complainant that the Master Fish Warden and the Fish Commissioners could not issue licenses to the appellee Kitzmiller, but would be compelled to issue licenses to the complainant. That thereupon respondents Kitzmiller and Clanton communicated the value of these fishing locations to the State Game Warden, and the members of the State Board of Fish Commissioners, who are parties respondent herein, and they entered into a scheme to secure the enactment of legislation at the twenty-seventh session of the legislative assembly of the State of Oregon designed to disqualify the complainant as an applicant for a license, and which would result in the rejection of his application to have the licenses renewed for the year 1919-1920. The respondents knew that complainant's naturalization proceedings had been irregular, and that he had not secured his final naturalization certificate, owing to the mistake of the clerk before mentioned, and in pursuance of the conspiracy to deprive him of securing a renewal of the fishing licenses for the year 1919-1920, for which he had already made application, they submitted to the legislative committee of the State of Oregon on fisheries, a proposed bill which required that an applicant for a fish license to fish with a "fixed appliance" must be a citizen of the United States, by a proposed amendment to Sec-

tion 5 of Chapter 188 of the Laws of 1915, and secured the enactment of this bill into a law, and by virtue of an emergency clause, it became effective on the 3rd day of March, 1919. This enactment is Chapter 292, of the Laws of Oregon for 1919, and printed in the appendix. Complainant made due application for the licenses described and tendered the fees required therefor. On the 1st of April, 1919, the application of complainant for the licenses to fish the locations in question was rejected by the state authorities on the grounds that complainant was not a citizen.

The Master Fish Warden and State Board of Fish Commissioners rejected complainant's application for the licenses in question on the grounds that a setnet is a fixed appliance, as the term is understood and construed by persons engaged in fishing, and that the amendment to Section 5 of Chapter 188 of the Oregon Laws of 1915, before adverted to, inhibited issuance of setnet licenses for taking or catching salmon to any person who was not a citizen of the United States, and that, inasmuch as complainant had not been admitted to citizenship, he was not qualified to be licensed to fish with setnets in the waters of the Columbia River. This latter act provided that the disqualification of persons who had not been admitted to citizenship should not "prevent the renewal of licenses for fixed appliances by citizens now holding the same."

Appellant's contention is that this law is void, which arises out of the following facts: that on the 29th day of

January, 1915, the legislative assemblies of the respective states of Oregon and Washington were in session, and on this day the legislative assembly of each state appointed a joint committee composed of the members of the legislative assemblies of each state to meet in Portland, Oregon, on the 6th day of February, 1915, for the purpose of conferring on such legislation affecting the fishing industry on the Columbia River as may be of joint interest to the two states and these two committees met in the city of Portland at the time fixed and agreed upon a report, making certain recommendations for a compact between the two states. This report is published on page 32 to 42 of the transcript of record and in the appendix.

The House concurrent resolution number three referred to was adopted on the 29th day of January, 1915, and printed in the appendix of this brief, provided for the appointment of this committee "for the purpose of conferring on such legislation affecting the fishing industry on the Columbia River as may be of joint interest to the two states." The joint committees of Oregon and Washington met on the 6th day of February, 1915, and agreed upon a report, which is part of Senate concurrent resolution number four. This resolution is also printed in the appendix, together with the report, and the report of the joint committee of the two states was ratified, and a committee, one from the Senate and one from the House, was appointed by the president of the Senate and speaker of the House, "to draft and present

a bill embodying the recommendations of this report, to the legislature, etc."

This report provided that no license for taking salmon, food or shell fish, shall be issued to any person who is not a citizen of the United States, unless such person has, in good faith, declared his intention to become a citizen, and is, and has been an actual resident of the state for one year immediately preceeding the application for said license, and that laws should be enacted providing suitable provision for testing the qualifications of the applicant for licenses; and it was further provided that it shall be unlawful for any person to fish in the waters or rivers over which the States of Oregon and Washington have concurrent right and concurrent jurisdiction, unless such person be a citizen of the United States, or has declared his intention to become such, etc.

It was also provided that in said waters it shall be unlawful in the use and operation *of a setnet* to create any artificial eddy, or erect any structure or obstruction for such purpose. A recommendation was made that the licenses and all other fees should be fixed at a definite schedule for all kinds of fishing and fishing gear. These fees included all kinds of fixed appliances such as traps, fish wheels, which are affixed to the banks of the stream or the bed of the river. *Setnet licenses for the taking of salmon was fixed at the sum of* $3.75. It was also recommended by the report that the recommendations should be embodied into a bill, to be submitted to the legislative assemblies of each state and that the bill,

when passed should act as a treaty between the states, when the laws of the two states should be ratified by Congress and that the agreement should thereafter be subject to modification only by the joint agreement of both states. These recommendations were immediately incorporated into bills and submitted to the legislative assemblies of each state, and were passed by the legislative assembly of each state. The Oregon act is Chapter 188 of the Laws of 1915. The Washington act is Chapter 31 of the Laws of 1915. Each act incorporated the entire recommendation made in the report of this committee. Subsequently, and on the 8th day of April, 1918, the Congress of the United States passed an act ratifying the compact and agreement between the two states. This act is published in 40 Stat. 515.

When the legislative assembly of the State of Oregon enacted Chapter 292 of the Laws of 1919, the act was subsequently submitted to the legislative assembly of the State of Washington for passage, but the legislative assembly of that state refused to pass the law.

It is the contention of the complainant that this latter act is an attempt to amend the treaty between the two states in respect to the qualifications of status as to citizenship, which permitted the issuance of a license to fish for salmon in the waters of the Columbia River, and, consequently, is void, and his rights to fish are determined and fixed by the terms of the compact between the two states; that his right to fish for salmon in the waters of the Columbia River with setnets had been es-

tablished and fixed for many years, by existing custom and usage and by Chapter 128 of the Laws of 1913, making it unlawful for the administrative officers to issue licenses to any person to build any fixed appliances in any locality in the Columbia River, when, in their judgment, the same interferes with a prior right of fishing, and fixing the method of constructing setnets and other fixed appliances, but especially providing that this amendment shall not effect any locations lawfully existing under previous statutes when this act takes effect and any or all such fishing appliances may be maintained upon such fishing locations as though this act had not been passed, etc., and, also, upon the terms of the treaty, or compact, between the two states, which recognized, in section 2 of the treaty, a right of priority to renew an existing or outstanding license to catch salmon in the waters of the Columbia River with setnets. That the provisions of Chapter 188, Laws of 1915 require the Master Fish Warden to issue licenses to those who possess the requisite qualifications, and under the customs and usages of fishermen on the Columbia River and the laws and decisions of the court in the State of Oregon, he had common right with the citizens of the State of Oregon to fish, upon compliance with existing laws regulating the right to fish, and that this right to fish pursuant to law is a right, of which he cannot be divested without violating a vested right and until a valid change is made in existing laws. That under the Act of 1915, he had a right to a renewal of the setnet licenses in question, and the failure of the legislative assembly of Washing-

ton to concur in the enactment of the Oregon Act of 1919 rendered the Oregon Act inoperative.

ASSIGNMENT OF ERRORS

(Title Omitted)

The appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files therewith his assignment of errors, as to which matters and things he says that the decree entered herein on the 11th day of October, 1920, is erroneous, to-wit:

1. Said Court erred in affirming the decree of the District Court for the District of Oregon, and dismissing the appeal of complainant for want of equity.

2. In holding that the compact and treaty between the States of Oregon and Washington, Oregon Laws 1915, Chapter 188; Washington Laws 1915, Chapter 31, ratified by Act of Congress, 40 Stat., 515, did not create a preferential right in the appellant to renew licenses previously issued by the state authorities of Oregon to fish the locations described.

3. In not holding and deciding that Oregon Laws 1919, Chapter 292 is void, and impairs the obligations of the compact and treaty between the States of Oregon and Washington, and impairs preferential rights vested in appellant by the provisions of said compact.

4. The Court erred in holding that without the consent of the State of Washington, the State of Oregon

could, by subsequent law, prescribe different qualifications for the holders of fishing licenses than fixed by the compact between the two states.

5. In deciding that the Act of Congress, 40 Stat., 515, contains the compact, and that the compact is not found in the concurrent Laws of the State referred to in the second assignment of error herein, and in Oregon House Concurrent Resolution adopted on the 29th day of January, 1915, ratifying the report of the joint committee of the two states agreeing upon legislation.

6. In construing the compact to the effect that qualifications of persons applying for license in respect to residence and status as to citizenship was not a law which affected the concurrent jurisdiction, and in not holding that the clause, "which would effect said concurrent jurisdiction," used in the Act of Congress ratifying the compact, refers to the, "or any other waters within either of said states," used in said Act.

7. The Court erred in holding that it could not inquire into the motives and influences which prompted the enactment of Oregon Laws 1919, Chapter 292.

8. The Court erred in not holding that by virtue of the usage and custom and laws adopted declaratory thereof for the Oregon Fish and Game Commission to renew fishing licenses to the same person for a given location upon application being made therefor, did not vest in appellant a right of priority to the locations for salmon fishing in the waters of the Columbia River, and

that he had a vested and property right therein, and that said Chapter 292, Oregon Laws, 1919, interfered with and impaired complainant-appellant's said fishing rights in violation of Federal guaranties.

9. The Court erred in not holding that Chapter 188 Oregon Laws, 1915, and Oregon Laws 1913, Chapter 128, vested a right of priority, and created a contingent vested right until a change was made by joint legislation of the two states, to fish for salmon in the described locations.

WHEREFORE said appellant prays the Honorable Court to examine and correct the errors assigned and for a reversal of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled case.

JAMES E. FENTON,
WM. P. LORD,
ARTHUR I. MOULTON.
Solicitors for Appellant.

POINTS AND AUTHORITIES

I

The issues tendered by the bill of complaint require a construction of the compact between the States of Oregon and Washington, and necessarily, involve a federal question.

Wedding vs. Meyler, 192 U. S. 581.

II

The right of fishery in waters lying between two states is generally regulated and controlled by treaty between those states.

19 Cyc. 1005.

III

Compacts between states are not invalid on grounds of surrendering inalienable rights of sovereignty.

Green vs. Biddle, 8 Wheaton 1, 108.
Kentucky Union vs. Kentucky, 219 U. S. 162, 163, 164.

IV

The citizens of both states are subject to all the obligations imposed and entitled to all the benefits conferred by the compact.

Georgetown vs. Alexandria Canal Co., 2 Peters, 96;
Evans vs. U. S. 31 Ap. C. (D. C.), 551.

In the case of a conflict between a treaty with a foreign nation and a subsequent act of Congress, the rule is that a subsequent act of Congress supersedes the provisions of a treaty. (Hijo vs. U. S., 194 U. S., 324), but this rule does not apply in cases where an act of the legislative assembly is passed after the taking effect of the

provisions of a compact; it has been held in the cases cited that the benefits to which the people of either state are entitled by a compact between two states, which provides that its terms and provisions shall not be changed or modified, except with the concurrence of the other state, is not affected by a subsequent law of either state, purporting to amend any of the terms of the compact, not concurred in by the other, as such subsequent law is void, and impairs the obligation of contract; in a controversy between the states growing out of the compact, it may be specifically enforced by a decree of the Supreme Court of the United States.

Green vs. Biddle, 8 Wheaton, 1, 108;
Wharton vs. Wise, 153, U. S., 153;
Virginia vs. West Virginia, 246 U. S. 565, 62 L. Ed. 883; 36 Cyc. 839;
State vs. Hoffman, 9 Md., 28.

V

The provisions respecting the qualification of applicants for fishing licenses, such as residence and status as to citizenship, were an integral part of the compact between the two states, providing for the establishment of the concurrent rights and concurrent jurisdiction in relation to the fishing industry in the waters of the Columbia River.

Eagle Cliff Fishing Co. vs. McGowan, 70, Or., 14;
Ex Parte Desjeiro (C. C.) 152 Fed., 1004;
State vs. Catholic, 75 Or., 367;

In re Mattson, (C. C.) 69 Fed. 435;
Nielson vs. Oregon 212 U. S. 315.

VI

The provision in the compact that an applicant for a license must have declared his intention to become a citizen of the United States, applies to all persons fishing for salmon in those waters regardless of the type of fishing gear or appliance used. The fact that the appliance is affixed to the bed of the stream within the territorial boundaries of either state does not affect this provision.

Report of Joint Conference Committee, Transcript of Record, pp. 32-44;
Oregon Laws 1915, Chapter 188, Sections 2, 3, 4, 5, 6, 7, 8, 8e and 20;

Senate Concurrent Resolutions Nos. 4 and 5;
House Concurrent Resolution No. 15;
Oregon Laws 1915, pp. 617-627;
Washington Laws 1915; Chapter 31 Sections 19, 25, 26, 27, 29, 30, 31, 43, 51 (p. 86) 58;
Oregon Laws 1913, Chapter 128.

VII

The compact is a public law and inures to complainant's benefit. He claims the right to take fish from the waters of the Columbia River by virtue of the terms of the compact providing that any person who has been a resident of the State of Oregon for one year and who has

declared his intention to become a citizen is a qualified applicant for a license to take salmon from said waters.

Wharton vs. Wise, 153 U. S. 155;
Hume vs. Rogue River Packing Company, 51 Or., 237-246;
Oregon Laws 1913, Chapter 128;
Oregon Laws 1915, Chapter 188, Sections 2, 3, 5, 6, 8 and 8e, also Section 20.

VIII

Contrary to the laws and judicial decisions of other jurisdictions, the laws of Oregon and the decisions of the highest court of the state have uniformly held that the right to fish in the navigable streams is free and common to all the citizens of the state. The state cannot vest an exclusive right to catch salmon in one person.

Hume vs. Rogue River Packing Co., 51 Or., 237, 246;
Eagle Cliff Fishing Co. vs. McGowan, 70 Or., 1, 12;
Monroe vs. Withycombe, 84 Or., 335;
Johnson vs. Jeldnes, 85 Or., 657;
State vs. Blanchard, 96 Or., 79;
State vs. Savage, 96 Or., 53;
Portland Fish Co. vs. Benson 56 Or., 147;
State vs. Hume, 52 Or., 1.

IX

The provisions of law regarding the granting of a

license to take fish to all qualified applicants is mandatory, and not a discretionary right in the Master Fish Warden.

Oregon Laws 1915, Chapter, Sections 8, 8e;
Daniels vs. Wagner, 237 U. S., 547;
Monroe vs. Withycombe, 84 Or., 335;
Williams vs. Seufert Bros. Co., 96 Or., 163;
Hume vs. Rogue River Packing Co., 51 Or., 245.

X

Appliances affixed to the bed of the stream such as traps, fish wheels, setnets, scows, etc., have long been recognized by custom and by the laws of the state as the lawful manner of taking fish and that the operator using such fishing appliance has a right of priority to the location during the fishing season and a prior right to renew the license to fish such location for the succeeding year, by making proper application therefor.

Williams vs. Seufert Bros. Co., 96 Or., 163;
Eagle Cliff Fishing Co. vs. McGowan, 70 Or., 12-15;
Monroe vs. Withycombe, 84 Or., 335;
Johnson vs. Jeldnes, 85 Or., 657.

XI

The right of priority for a license for a fixed fishing appliance, to fish in the waters of the Columbia River

is recognized by the laws of the State of Oregon. Custom and usage may be admitted in evidence, where it can be presumed that the statute was drawn with reference to such usage, and also may be admitted to show the practical construction which has been given the statute. The statutes of Oregon in respect to the right of renewal are declaratory of the custom and usage, and, as to fishing in the Columbia River, with fixed appliances is confirmed by the terms of the compact and recognized by other laws of the state.

National Lead Co. vs. U. S. 252 U. S., 140;
17 Corpus Juris, 478, and authorities cited;
Oregon Laws 1915, Chapter 188, Sections 2, 3, 4, 5, 6, 7, 8, 8e, 20;
Oregon Laws 1915, Chapter 157;
Oregon Laws 1913, Chapter 128;
Williams vs. Seufert Bros. Co., 96 Or., 163.

ARGUMENT

(*a*) *The compact between the two states grants to resident-aliens the right to fish the locations for which licenses are sought.*

If the Oregon Act of 1919, (Oregon Laws 1919, Chapter 292), providing that licenses shall not be issued to persons other than citizens of the United States, and further providing *"that nothing contained shall prevent the renewal of licenses for fixed appliances by citizens now holding the same,"* and followed by a provision that for two years after the passage of the Act, gill net and troll licenses may be granted to applicants who have declared their intention to become citizens prior to

January 1, 1919, and who have complied with the requirements of residence, is void, as an amendment to the compact, not concurred in by the two states, as required, the appellant is entitled to a mandatory writ requiring the Master Fish Warden to recall and cancel the licenses issued to appellee Kitzmiller, and a decree establishing his right to priority and to have issued to him by the Master Fish Warden licenses to fish the locations described, and for a further decree for an accounting. This calls for a consideration of the compact between the two states.

Where two states have entered into a treaty or compact the citizens of both states are subject to all the obligations imposed and entitled to all the benefits conferred by the compact.

> Georgetown vs. Alexandria Canal Co., 2 Peters, 96;
> Evans vs. U. S. 31 Ap. C. (D. C.), 551.

Compacts between states, regulating fishing in boundary waters, from the earliest period, have been recognized as an appropriate method of conserving the supply of fish frequenting such waters. Such compacts as the compact between the states of Washington and Oregon usually provide that the rights of the people of either state to fish in the waters, subject to the compact, as common to the people of both states.

19 Cyc., 1005 says:

> "The right of fishery in waters lying between two states is generally regulated and controlled by

treaty between those states, but in the absence of such treaty the right of fishery in citizens on one side of the main channel of the river can be regulated only by the laws of the state on that side."

The compact between Maryland and Virginia is cited as authority for the text. This compact, among other things, provides that the right to fish in the Potomac should be common to the citizens of both states and that all laws and regulations which may be necessary for the preservation of fish, etc., shall be made with the mutual consent and approbation of both states. The compact, in many respects, is similar to the compact between the states of Oregon and Washington. Many of its features were borrowed from this compact. It has been construed by the Courts of Maryland in State vs. Hoffman, 9, Maryland, 28, that laws passed by one state in reference to such waters must by the terms of the compact receive the consent of the other, and, therefore, an indictment under subsequent laws, purporting to amend the compact, was held defective in not averring that the law had been consented to by Virginia.

The compact between Virginia and Maryland gave to the citizens of Maryland the privilege of fishing within the waters of Virginia. A question subsequently arose as to what waters were covered by the compact. It was claimed by Maryland that this compact covered waters of the Potomac Sound from which the taking of oysters was prohibited by a statute of Virginia. A citizen of Maryland was indicted for taking oysters in violation of

the statute of Virginia, and attempted to justify on the grounds that the compact gave him a right to fish in the waters in common with the people of Virginia. The case was ultimately decided by this Court, and it was held that the waters in controversy were outside the boundaries of the compact. It is very clear from what the court had to say in respect to the terms of the compact between the two states, that, if a citizen of Maryland had been taking oysters from the territorial lands of Virginia, included within the operation of the compact, that the decision would have confirmed the right, notwithstanding a law to the contrary, not concurred in by Maryland. The case construing this compact is Wharton vs. Wise, 153 U. S., 153, and is a leading case, and can be read, as throwing much light upon the compact under consideration. It should be borne in mind throughout this case, that fixing the qualifications of fishermen and regulating the industry is a competent provision to be the subject of agreement between two sister commonwealths.

Concurrent jurisdiction, as the term is used in the compact between the two states, should not be confused with the term concurrent jurisdiction, as used in the act admitting Oregon into the Union, and Acts of Congress and compacts between states, fixing jurisdiction of the states on boundary waters between states.

In Nielson vs. Oregon, 212 U. S., 321, the Federal Supreme Court held that the grant of concurrent jurisdiction on the Columbia River did not authorize one state

to punish an act made *malum prohibitum* by the laws of one state which was permitted by the laws of the other state within its territorial boundaries, and the court, speaking through Justice Brewer, said:

> "Obviously, the grant of concurrent jurisdiction may bring up, from time to time, many and some curious and difficult questions, so we promptly confine ourselves to the precise question presented. * * * * *"

Shortly prior to the decision in this case, this Court had under consideration, a controversy over the boundaries between the two states, indirectly arising out of the controversies between fishing interests. The case is Washington vs. Oregon, 211 U. S. 127 and 214 U. S. 217. The opinion was written by Mr. Justice Brewer. Pending the petition for rehearing the Nielson case was argued and submitted. The Court caught an insight into the controversy existing between the two states in relation to the fishing industry and the impossibility of enforcing any laws of either state regulating the fishing industry, which were not concurred in by the other, as a result of the decision in re Mattson, 69 Fed. 535, and in the Nielson case. Judge Brewer, in an opinion on rehearing, took occasion to point out that the appropriate method to settle difficulties between the states was by means of a compact between the two states. The Court said:

> "Congress, evidently recognizing the difficulty which attended the location of the exact boundaries,

provided that the states of Washington and Oregon should have concurrent jurisdiction in civil and criminal cases upon the Columbia River. Yet this provision does not determine the boundaries between the two states, and has proved insufficient to settle the disputes between them as to things done upon the Columbia River. Nielson vs. Oregon, 212 U. S., 315."

(Here is quoted an Act of Congress approved January 26, 1909, granting consent to a prospective compact between the States of Mississippi and Arkansas, which we omit.)

"Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Arkansas. We will submit to the states of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, far as possible, the present appropriate boundaries between the two states, and their representative jurisdiction."

Says this Court in Nielson vs. Oregon, 212 U. S., 319:

"Concurrent jurisdiction, properly so-called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase."

But, it has been held that this concurrent jurisdiction does not extend to the bed of the stream, by such acts.

Nicoulin vs. O'Brien, 248 U. S. 113;
Columbia Packers Assn., vs. McGowan, 219 Fed. Aff'd 245 U. S. 352.

Aff'd 245 U. S. 352.

and see Central R. Co. vs. New Jersey, 209 U. S. 472, where the limitations of concurrent jurisdiction are clearly defined.

The concurrent jurisdiction construed in the Nielson case, and the latter case, of Columbia Packers Association, supra, was the concurrent jurisdiction on the Columbia River of the states of Oregon and Washington granted by the acts of Congress of March 2, 1853, Chap. 90, 10 Stat. L. 172. Act of Feb. 14, 1859, Chap. 33, 11 Stat. 383.

When the compact of 1915 was drawn between the states of Oregon and Washington, the limitations of the concurrent jurisdiction were well known and defined by these adjudications. Consequently, when the compact was drawn a legislative definition was made of concurrent jurisdiction to avoid the limited definition which had been given by the decision in the above case.

The subject of the compact was not concurrent jurisdiction "on" the river, but the regulation and preservation of the fishing industry which had become the source of great pride and wealth to the two states. The

joint interest of the two states in connection with the preservation of salmon and other food fish frequenting the waters was, however, concerned only with the boundary waters of the Columbia River and its tributaries "within the confines of the two states, where the same are state boundaries."

"To the Senate and House of Representatives of the States of Washington and Oregon:

We, your Joint Committee, heretofore appointed to confer, concerning legislation, with reference to the fishing industry in the waters and streams over which said states have concurrent rights and jurisdiction, beg leave to submit the following report:

We recommend that all laws, appertaining to commercial fishing, in the waters and streams, over which said States have concurrent rights and concurrent jurisdiction, shall remain unchanged, except in the following particulars, to-wit:

That the Columbia River District shall consist of the waters of the Columbia River, and its tributaries within the confines of the States of Washington and Oregon, where the same are state boundaries. * * *"

This recommendation was adopted by resolution of the respective legislative assemblies of the states of Oregon and Washington. The Oregon resolutions are published in a supplement to Laws 1915, adopting the foregoing recommendations. (See Laws 1915, 617-618, and also published in the appendix to this brief.)

It is also to be noted that resolution No. 5 recites that the legislature fulfilled the recommendations by enactment of Senate Bill No. 265, which is Chapter 188 of the Laws of 1915. Section 1 of Chapter 188 of Oregon Laws 1915 provides as follows:

> "The waters over which the states of Oregon and Washington shall be deemed to have concurrent jurisdiction shall comprise the waters of the Columbia River and its tributaries, within the confines of the states of Oregon and Washington, where said waters are state boundaries."

From this history of the legislation, it is apparent that the legislative assemblies of the two states were broadening the definition of concurrent jurisdiction, as used in the Act of Congress admitting Oregon into the Union, in respect to the compact regarding the fishing industry within the Columbia River District. The legislative assemblies of the two states were endeavoring to regulate the entire fishing industry of the Columbia River, regardless of the ownership of the bed of the stream, or the territorial boundaries of the state. Concurrent jurisdiction is therefore defined by legislative act to mean, as comprising the waters of the Columbia River and its tributaries within the confines of the two states, where such waters are state boundaries. The boundaries of the states are fixed by the Act of Congress of 1859 admitting Oregon into the Union. Starting at a fixed point on the Columbia River, the boundaries are fixed as "easterly to and up the middle of

the channel of said river, and, where it is divided by islands up the middle of the widest channel thereof to a point near Fort Walla Walla, etc." The boundaries, as defined by this act, are held for naught, as far as the boundaries of the compact are concerned. The question was the regulation and protection of fish frequenting certain waters and it was agreed that the rights to fish and the regulation thereof were to be common to the people of both states, irrespective of whether fishing was done with appliances fixed to the territorial soil of either state.

Now, appellees say, because appellant's application for license to fish calls for a fishing location within the Oregon side or boundary of the river, with gear fixed to bed of the stream, wholly within the State of Oregon, the concurrent jurisdiction of the two states is not interfered with, and the facts do not bring the case within the compact, or involve concurrent jurisdiction. The argument amounts to this: Concurrent jurisdiction is not affected because the fishing gear used is attached to Oregon soil. In support of the position, the case of Columbia River Packers Association vs. McGowan 245 U. S., 352, and Nicoulin vs. O'Brien, 248 U. S., 113, are cited. The Oregon case was decided upon the construction of the granting of the concurrent jurisdiction, by the Act of Congress admitting Oregon into the Union, and, it was held that the concurrent jurisdiction granted was on the river, and did not extend to the bed of the stream within the boundaries of either state. The rights of the parties was not determined by the compact under

consideration, but solely upon the extent of the operation of concurrent jurisdiction used in the Federal Act. The Nicoulin case called for a construction of the Virginia Compact, where the term concurrent jurisdiction was involved, similar to the term used in the Act of Congress admitting Oregon into the Union, with no attempt to regulate fishing. It was a settlement of boundaries.

This controversy calls for a construction of a compact between two states agreeing upon regulations for the protection of the fishing industry and defining the qualifications of fishermen fishing with all kinds of gear in the waters of the Columbia River District whose boundaries are defined as covering the entire waters of the Columbia River and its tributaries within the confines of the states of Oregon and Washington.

The compact does not attempt or purport to define concurrent jurisdiction as used in the Act of Congress admitting Oregon into the Union, but it is broader, and operates in addition to waters over which the two states have concurrent jurisdiction, on and in "any other waters within either of said states which would affect said concurrent jurisdiction." The entire fishing industry of the Columbia River is regulated by concurrent legislation, including the type and character of gear, and the amount of license fees for all fishing gear used. Fish wheels on scows which are fastened to the banks or anchored to the bed of the stream, traps which are constructed by driving piles into the bed of the stream, wiers, stationary fish wheel, set nets which is defined in State vs. Blanchard, 96 Or., 79, "as a net fastened at

one or both ends, so that the whole net cannot drift with the current, and notwithstanding this, be in a condition to take fish, it is kept in place or position by ends being made fast to the bed of the stream by an anchor, and other appliances which do not drift with the current, are included in the compact as fixed appliances.

The amounts to be paid for fishing licenses are fixed by the compact as the same for both states. The right to a renewal of license for fishermen holding licenses to catch fish with these fixed appliances is especially provided for by the compact. What constituted an abandonment of a location to fish with fixed aplliances is defined. It is made unlawful in the use and operation of a set net to create an artificial eddy, or erect any structure or obstructions for such purpose. No fish trap shall be located within three miles below the mouth of Lewis River. Set net licenses are fixed at $3.75, etc. All of which goes to show that the entire fishing industry was the subject of regulation and that it was the intent to fix by the terms of the compact an equal right in persons possessing the qualifications of residence and status as to citizenship fixed by the compact as common to the people of both states, regardless of the character of fishing gear used and regardless as to whether the appliances used are on the Oregon or Washington side of the Columbia River or its tributaries.

Fishing is the subject of the compact over the entire waters of the Columbia River from shore to shore, and

the waters of its tributaries within the confines of the States of Oregon and Washington where the same are state boundaries. Many other concurrent provisions will appear later in this argument. The compact gave a broader meaning and enlarged the operation of the concurrent jurisdiction "on" the Columbia River, in respect to regulating the fishing industry, than the definition given that term by the Courts in construing the limitations of the grant of concurrent jurisdiction to the two states, as found in the Act of Congress admitting Oregon into the Union, extending concurrent, civil and criminal jurisdiction.

The people of the two states were only incidently concerned with the grant of concurrent jurisdiction "on" the Columbia River; they were concerned in enacting mutual laws for the protection of fish in these waters and in doing so it was deemed expedient to fix the right to fish, as far as qualifications of applicants for licenses relative to citizenship, residence, etc., as common to the people of both states in the entire waters of the river, and its tributaries which are state boundaries, so that the fishermen of Washington would not have greater or different rights than the fishermen of Oregon and at the same time, adopted regulations operating over the entire river which would prevent the species from being extinguished—just as the compact did between Maryland and Virginia, construed in Wharton vs. Wise 153 U. S. 556. The fact that the appellant's application for set net licenses were on the Oregon side, cannot affect his rights under the compact, for they are

fixed by the compact, and a subsequent statute depriving him of his rights under the compact, which was refused to be concurred in by the State of Washington, cannot be the source of power of the Master Fish Warden to refuse him the right to renew his license for these locations, because the law is void for not being concurred in by the other states as in State vs. Hoofman, 9 Md. 28 which has already been discussed.

An argument was advanced by respondents, that the compact between the two states is found in the Act of Congress consenting to and ratifying the compact. The construction placed upon it is difficult to understand in the light of a consideration of the purpose and subject matter of the compact and the results sought to be obtained. For, if the compact is the Act of Congress referred to, and the construction placed upon it by respondent prevailes, the compact might as well not have been entered into for its meaning will never be ascertained or fixed without a judicial decision to determine whether any subsequent law of the legislative assemblies of either state not concurred in by the other regulating fishing on the Columbia River, affects concurrent jurisdiction.

It was argued by appellees in the Court of Appeals.

"The question is then: Is it necessary that Chapter 292, General Laws of Oregon 1919, be concurred in by the legislature of the State of Washington, before it becomes operative? The answer depends upon the interpretation of the compact. Let us consider this compact

again, and for that purpose we will italicise such portion as we deem important.

> "All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia river, over which the States of Oregon and Washington have concurrent jurisdiction, *or any other waters within either of said states, which would affect said concurrent jurisdiction,* shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states."

The phrase " which would affect said concurrent jurisdiction" is significant and in our view decisive. If the act read "All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia river * * * shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states" there would be more force to the contention that the words "regulating, protecting or preserving fish" are broad enough to include the qualifications of fishermen and regulating those who may and may not obtain licenses, and that accordingly an act of Oregon limiting the right to a license to a citizen and a resident must be concurred in by the State of Washington before it becomes effective. But the whole act must be construed together. The antecedent of the words "which would affect said concurrent jurisdiction" is the

word "laws." Accordingly it is only such laws and regulations now existing or hereafter adopted which affect the concurrent jurisdiction, that need the concurrence of both states."

We submit, that the Act of Congress is not in the compact, but is the consent of Congress required to be given by Section 10, Ar. I of the Federal Constitution. It is doubtful from many decisions, if this consent is required. See Wharton vs. Wise. The compact is to be found in the concurrent laws of the two states, in the respective acts of the legislative assemblies of 1915, which embodied the recommendations of the conference committees of the two states printed on pages 30-41 of the Transcript of Record and in the appendix of this brief It is to be noted that Section 20 of the Oregon Act, and Section 116 of the Washigton Act providing for the taking effect of the "treaty" between the two states refers to the ratification by Congress and recites, "ratify the *recommendations of the conference committee of the States of Oregon and Washington*, appointed to agree on legislation necessary for the regulation, preservation and protection of fish in the waters of the Columbia River," the Oregon Act providing: "over which said states have concurrent jurisdiction and other waters within either states which would be affected by said concurrent interest," and the Washington Act providing "ratify the recommendation of the conference committees of the states of Washington and Oregon, appointed to agree on legislation necessary for the regulation, preservation and protection of fish in the

waters of the Columbia River, or its tributaries, over which said states have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction," said recommendations being as follows: (Here follows a proposed form for ratification by Congress subsequently adopted which we omit.)

It is also to be noted that the recommendations of the joint conference committee of the two states contains this provision: (Transcript, page 41, and appendix.)

> "In conclusion, we suggest and recommend that a suitable bill, or suitable bills, be drawn immediately to present to the Legislatures of the states hereinbefore mentioned, carrying out the recommendations hereinbefore made, and that said bill, or bills carry an emergency clause so that the same shall be immediately effective as the fishing industry of the states mentioned will be hindered and injured unless such laws as we have suggested, go into immediate effect, and that this report shall be immediately adopted, by resolution of both houses of each legislature.
>
> *"We further recommend that a resolution be passed by the Legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the states of Oregon and Washington shall act as a treaty between said states, subject to modification only by joint agreement of said states."*

The compact is, therefore, the concurrent laws of the

two states found in the respective acts of the legislative assemblies for the year 1915 (Oregon Law 1915, Chapter 188—Washington Law, 1915, Chapter 31) incorporating the recommendations and report of the conference committees of the two states. The clause of the Congressional Act providing "all laws and regulations now existing," refers to the laws and regulations of the states closing seasons to fishing, making it unlawful to create an artificial eddy in using set nets, providing for revenue by license fees, and regulations providing for the qualifications of fishermen, defining the length of the fishing gear, providing for the right of renewal of fishing licenses for fixed appliances, and all the concurrent laws enacting into the laws of the two states, the recommendations of the conference committee and other concurrent laws.

The argument was also made that the clause of the Congressional Act providing "which would affect said concurrent jurisdiction," refers to the words "laws and regulations," used in the first clause of the Act, and it is only laws "now existing" which would affect the concurrent jurisdiction of the Columbia River as this term has been construed in the Act admitting Oregon into the Union, that require the concurrence of both states and inasmuch as it is contended that the qualifications of fishermen is not a law which affects the concurrent jurisdiction on the Columbia River, therefore, a law changing the qualifications of fishermen does not require the concurrence of both states, by the terms of the compact. Appellees contend that "the antecedent of the

words 'which would affect said concurrent jurisdiction' is the words 'laws'." This is an erroneous construction and would render the compact ineffective. The antecedent of the words "which would affect said concurrent jurisdiction" is not "laws" but the clause "or any other waters within either of said states." A consideration of what waters are affected by the compact and the purpose of the compact will show that the analysis made by appellee's is not possible under the wording of the act.

It was the purpose and intent that a modification of all the concurrent legislation of 1915 and previous concurrent laws, or provisions of the compact should not be made except by mutual agreement of both states. It was not only the waters of the Columbia River which were geographically subject to the compact, but the Columbia River District, which is defined by the compact to "consist of the waters of the Columbia River, and its tributaries within the confines of the States of Oregon and Washington where the same are state boundaries." (See recommendations of conference committee, Transcript of Record, page 32; Oregon Law, 1915, Chapter 188, Section 1; Washington Law, 1915, Chapter 31, Section 18, 116.) (Oregon references printed in Appendix.)

Reference to sections 20 and 116 of the respective Acts makes clear that the antecedent of "which would affect said concurrent jurisdiction," is "any other waters within either of said states," and not "laws and regulations now existing, etc." Section 20 of the Oregon Act reads as follows:

"Section 20. Should Congress, by virtue of the authority vested in it under Section 10, Article I of the Constitution of the United States, providing for compacts and agreements between States, *ratify the recommendations of the conference committees of the States of Oregon and Washington, appointed to agree on the legislation necessary for the regulation*, preservation and protection of fish in the waters of the Columbia River, over which said States have concurrent jurisdiction, *and other waters within either State, which would be affected by said concurrent interest*, recommendation being as follows:

" 'We further recommend that a resolution be passed by the Legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the States of Oregon and Washington shall act as a treaty between said States, subject to modification only by joint agreement by said States;' and said recommendation having been approved by resolution adopting the report of the conference committee, then, and in that event, there shall exist between the States of Oregon and Washington a definite compact and agreement, the purport of which shall be substantially as follows:

"All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington

have concurrent jurisdiction, *or any other waters within either of said States, which would affect said concurrent jurisdiction,* shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both States."

If there is any doubt whether the antecedent of the phrases "which would affect said concurrent jurisdiction," is "law," or "any other waters within either of said states," it is removed by a reading of this section in its entirety and the report of the joint conference committee of the two states, and a consideration of the purpose of the compact sought to be attained.

Through indiscriminate fishing and exhaustive methods of capture by resident and alien fishermen the supply of fish frequenting these waters was becoming fast exhausted, and it had become impossible to enforce any laws enacted by the two states designed to protect and conserve the future supply of fish, by reason of the construction placed upon the grant of concurrent jurisdiction to the two states by the Congressional Acts referred to.

In re Mattson, 69 Fed., 535, the Oregon law providing for closed seasons in these waters, not concurred in by the other state, was held unenforcible by the Circuit Court. In re Desjeiro, 152 Fed., 104, the Oregon law providing residence qualifications for licensees, not concurred in by the other state, was likewise held unenforcible. A subsequent Oregon law prohibited the use

of purse-seines, permitted by the laws of the other state, and the Oregon Courts held in State vs. Nielson, 51 Or., 588, that the most restrictive statute prevailed over a less restrictive statute of the State of Washington. This case was reversed by this Court and it was held that Oregon did not have power to punish an act made *malum prohibitum* which was permitted by the laws of the other state within its territorial waters.

The condition which was confronting the people of the two states was adverted to in the Nielson case, supra, as follows:

> "If this is not so, and the states of Oregon and Washington must join in regulations to protect the fish industry on the Columbia River, a thing they have hitherto been unable to do, the river will practically become a common fishing ground, without limitation or restriction, and one of the greatest industries on the coast be speedily destroyed."

It is to be noticed that Justice Brewer, in Washington vs. Oregon, 214 U. S., 217, submitted that the two states should enter into a compact, relative to these waters.

By the year 1915, it became apparent to the people of the two states that the supply of fish was being so fast depleted that to conserve a future supply, a treaty between the two states was imperative, and the only feasible method to protect the industry. Accordingly, committees were appointed from the legislative assemblies

of the two states to agree upon legislation necessary to protect the fishing industry in these waters. The result of their conference was the report to which we have adverted, and which is printed in the appendix.

Both states in 1915 saw fit to enter into a compact, which, among other things, fixes the qualifications of fishermen in a river which separates the two commonwealths, and over which there had been much controversy and crimination and recrimination between the people of the two states as to open seasons, character of fishing gear and appliances used by fishermen, and residence and status of persons who would be permitted to fish in the waters in controversy, and it was agreed by both states that licenses to take fish in the waters of the Columbia River "within the confines of the States of Oregon and Washington," should be issued only to residents of either state, who was a citizen and resident of the state in which he applied for a license for one year, and to resident aliens, who had declared their intention to become citizens and had resided in the states for a year.

Prior to the compact between the States of Oregon and Washington the two states had different laws respecting the qualification of residence and citizenship for applicants for licenses to fish for salmon in the waters of the Columbia River, and a result non-residents and foreigners were engaged in fishing in these waters during the fishing season, and moved to other parts as soon as the season was over, and as long as there was no concurrence of legislation between the two states, neither could

enforce its laws designed to conserve the supply of salmon frequenting the waters, and as a result the salmon were being fast exterminated by the exhaustive methods of capture used by vast hordes of non-resident and alien fishermen fishing these waters, who had no interest in protecting and preserving the future supply of fish. Large and immediate gains were their interest. Laws of either state designed to conserve the fish were violated with impunity, because such laws could not be enforced by the failure of the two states to concur in legislation in respect to laws regulating the fishing industry. This is illustrated by the decision in Ex Parte Desjero, 152 Fed. 104, where the state of Oregon attempted to prosecute fishermen for fishing in the Columbia River who did not possess the requirements as to citizenship and residence fixed by the Oregon laws to permit the catching of salmon in its waters, but who were qualified under the Washington laws, and to whom had been issued a license by the state of Washington to fish in the waters of the Columbia River, and the court held that the State of Washington, having not concurred in the requirement of the Oregon law making it an offense to fish without being a resident of the State, "the act is void as to all persons, whether they be citizens of Oregon or California, etc."

See also State vs. Catholic, 75 Or., 367, where the residence question was again before the court as well as the case of Eagle Cliff Fishing Company vs. Mc-

Gowan, 70 Or., 14, where the requirement of qualification of residence and declaration of intention to become a citizen as a requisite to fish for salmon in the Columbia River is commented upon.

It is thus apparent that the failure of the two states to enact concurrent legislation for the protection of salmon in the waters of the Columbia River, was fast tending towards the extermination of the fishing industry in the waters of the Columbia River, and the two states had in mind, entering into the compact, to enact laws as far as the right to fish in the Columbia River was concerned which would be alike to the citizens of both states, and a compact between the two states was the most feasible method of attaining the objects desired. One of the important features of the compact was that the qualifications for a license to fish in these waters should be the same as to the residence and status as to citizenship of fishermen. It had long been the subject of bitter controversy between the people of the two states and the people of Oregon had openly charged in the past that the people of Washington by failing to provide by law a qualification of residence and status as to citizenship for fishermen were purposely attempting to destroy the fishing on the river, and it was of great importance that this feature be incorporated into the compact as one of the preventive terms. The legislative assemblies of the states of Oregon and Washington appointed a joint committee to confer and agree upon legislation, and the

terms and provisions of the compact relating to the fishing industry, and the report of this committee discloses that the requirements of residence and status as to citizenship was of such importance that it was one of the first provisions fixed.

This report is printed in full in the appendix. If any uncertainty is encountered as to what provisions are included in the compact, a reading of the report will remove them, because its provisions were carried into the concurrent laws passed by both legislatures. This report cites the following:

> "That no license for taking or catching salmon, food or shell fish shall be issued to any person who is not a citizen of the United States, unless such person has, in good faith, declared his intention to become a citizen, and is, and has been an actual resident of the state for one year immediately preceeding the application for said license, nor shall any license be issued to a corporation unless it is authorized to do business in the state, where the application for such license shall be made.
>
> "That nothing contained in this suggested act shall be construed to prevent the issuance of licenses to Indians, providing such applicants possess the qualifications of citizenship, and residence required under the suggested act, nor preventing the renewal of licenses on fixed appliances by persons now holding the same.

"That in the event both states shall provide the same qualifications relating to citizenship, and length of residence, in each state, then, and in that event, all gill net licenses, issued by the States of Oregon and Washington shall be valid as to the waters of the Columbia River in the States of Oregon and Washington as though issued by the Fish Commissioners of the States of Oregon and Washington, and in that event, the Department of Fisheries, of each state, or the official who has charge of issuing such licenses, shall furnish to each other the name of the licensee and the number of his license without cost or expense to either state.

"That it shall be unlawful for any person to fish or take for sale, or profit any salmon, sturgeon, or other food fish, in any of the rivers or waters over which the States of Oregon and Washington have concurrent rights, and concurrent jurisdiction, unless such person be a citizen of the United States, or has declared his intention, in good faith, to become such, and has been for one year immediately prior to the time he makes application an actual resident of the state from which he seeks to obtain his license.

"We further recommend that each of the states represented in this committee shall provide suitable provisions for testing the qualifications of the applicant making such application."

Under the terms of the compact any person possess-

ing the requisite qualifications of residence for a period of one year and that the applicant shall have declared himself to become a citizen is absolutely entitled to a license to catch salmon regardless of the fishing gear or appliances intended to be used in catching salmon. Fixed appliances, such as traps, wheels and setnets, which are usually attached to the shore or the bed of the river, are covered by the compact regardless of whether the trap is located within the boundaries of either state. The provisions of the compact, as disclosed by the report of the conference committee of both states, recommended that licenses to catch salmon with *setnets* should be fixed at $3.75. This recommendation was carried into the compact, as disclosed by section 8 of Chapter 188, Oregon Laws 1915, and section 51 of Washington Laws, 1915, Chapter 31, page 86. It is also a significant fact that the license fees for traps, fish wheels, pound nets, etc., for the catching of salmon were agreed upon by the conference committee and carried directly into the compact. Likewise, the provisions of the compact, that the failure to renew the license for any fish trap, pound net, fish wheel, or location for fixed appliances on the first day of April of any year shall constitute an abandonment of the location, (Chapter 188, sec. 2) and the further provision found in section 5 of this act, providing that nothing contained herein shall be construed to prevent the renewal of licenses for fixed appliances by persons now holding the same.

These provisions show beyond any doubt that the compact between the States of Oregon and Washington

intended to fix, by an unalterable agreement unless changed by mutual consent, the right, of any person who possessed the requisite qualifications as to residence and citizenship, fixed by the terms of the compact, to take or catch salmon in the waters of the Columbia River regardless of the kind of fishing gear or appliance used, and therefore, the contention that is made, that the terms of the compact only operate in respect to qualifications of residence and status as to citizenship, upon fishermen using seine, gillnets and other gear fishing in the waters of the Columbia River, and which are not attached to the banks or the bed of the stream, has no foundation in point of fact. The very terms of the compact show this not to be the case.

It was deemed advisable for the protection of the fishing industry by the legislative assemblies of the two states to fix the qualifications of persons fishing for salmon and other food fish in the waters of the Columbia River and its tributaries in respect to citizenship and residence as common or the same as to the two states in these waters. It had been the subject of controversy for years, as disclosed by the opinions of the Court in Ex Parte Desjeiro, 152 Fed. 104; Eagle Cliff Fishing Co., vs. McGowan, 70 Or., 14; and State vs. Catholic, 75 Or., 367; it is just as much a subject of bitter controversy as the two states providing different times for closed seasons for fishing in the Columbia River, held to be unenforcible in re Mattson, 69 Fed., 535; and the use of purse seines permitted by the laws of Washington in these waters, which the people of Oregon claimed

was permitted by Washington for the purpose of destroying the salmon fishing on the Columbia River, and made unlawful by the laws of Oregon, and also held unenforcible in Nielson vs. Oregon, 212 U. S., 315.

When the two states entered into a compact, it fixed a right to the issuance of a license to catch fish to aliens who had declared their intention to become a citizen and had resided in the State for a year. If it is not an integral part of the compact, why was the conference committee so concerned about it, as disclosed by the excerpts quoted, and why should the provision be carried into the laws of the two states?

It is plain intent of the compact, and what was designed it would accomplish. If it is given any other construction, it is robbed of its meaning and is "as sounding brass and tinkling cymbal." A construction should be adopted by the court as will give effect to every provision of the compact rather than to adopt a construction of a clause which will render the compact nugatory.

Both the District Court and the Court of Appeals held that the qualification who shall be permitted to take fish from the waters of the Columbia River should not be held to affect the concurrent jurisdiction.

(*b*) *The right to a license under existing law is not discretionary.*

The qualifications of licensees are matters of concern to the sister commonwealths and do affect the laws regulating the fishing industry of the two states, because if the power remained with either state to change the

qualifications of a licensee to fish there is nothing to prohibit either state from permitting any person to fish in the waters, and the result will be that citizens of other states will come into the state removing the restrictive qualifications, and fish the waters to such an extent that the fish would be fast exterminated. The residence qualification was designed to prevent the fishing of these waters by persons who made no contributions to the state, and were not interested in the continued development and conserving the fish frequenting these waters.

Any person who had been a resident of the state for a period of one year and who had declared his intention to become a citizen of the United States had a right under the terms of the compact to a license to fish and a subsequent law inhibiting any person but citizens of the United States from fishing in the waters of the Columbia River, passed subsequently to the adoption of the compact, and not agreed to by the State of Washington, is void, because the compact and the act of Congress ratifying it, expressly provides that the compact shall not be altered or changed without the mutual consent of both states.

If the premise that the compact between the states of Oregon and Washington, fixing qualifications of fishermen, cannot be changed by the State of Oregon, without the consent and approbation of Washington, and that the statute grants to unnaturalized foreign residents residing in the State for one year who have declared their intention to become citizens, a right to a license to

catch fish is sound in law, then the conclusion that the complainant has a right of priority and a superior right under the law, is obviously right, from the construction given the law by the Supreme Court of Oregon in Williams vs. Seufert, 96 Or., 163, hereafter discussed.

II

It was held by the District Court that a license to take fish is a privilege granted by the State, and that a license has no vested right to a renewal of one previously issued. If this holding of the Court is correct as a matter of law, it would naturally follow that the appellant would not be entitled to the relief prayed for. We believe that the Court was in error. A consideration of this question calls for a discussion of the Act admittting Oregon into the Union, and the construction placed by the Courts of Oregon on this Act, and a construction of the commercial fish laws of Oregon. The decisions of the Oregon Supreme Court in respect to the right to fish, are not in harmony with the decisions of the Courts of other states. It has been uniformly held by the Oregon Courts that the title to migratory fish in a state of freedom is in the state in its sovereign capacity, and not as a proprietor, and it can therefore be said that the right of a citizen to catch fish is a privilege to be granted or withheld by the state as it pleases without impairing the property rights of citizens. In discussing the nature of the right to fish in the opinion affirming a judgment convicting a fisherman of extending his set net more than one-third across a slough in violation of a state law making such act criminal, the Oregon Supreme Court in State vs. Blan-

chard, 96 Or., 79, speaking through Chief Justice McBride, says:

> "The argument also ignores the repeated decisions of our own and other courts that nobody has an absolute right to fish in the waters of this state; that the property in fish, abounding in the waters of this state, so far as they can be said to be property, is in the state in trust for the people, and, so long as it does not discriminate between citizens, the Legislature may prescribe the time in which and the method by which fish may be taken, and the waters from which they may be taken. As the Lord said, 'Ye shall not eat of every tree of the garden,' so the state may say, 'You shall not fish in every stream in the state.' The restriction, in its substance, does not apply to the waters or the locality of the stream, but the fish that abound therein. It is the command of the quasi proprietor, designating upon what terms its property shall be enjoyed—by the citizen and by every citizen upon the same terms."

Again in State vs. Savage, 96 Or., 53, the Oregon Supreme Court, in holding an act prohibiting the taking of salt water crabs from Coos County for the purpose of sale, by making the act inapplicable to those engaged in the canning business, was void, as discriminatory class legislation, and void under Article I, Section 20 of the State Constitution, the Court says:

> "The title to migratory fish, *ferae naturae*, while

in a state of freedom, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for citizens of the state in common. (Citing authorities)."

So, in the earlier case of Portland Fish Co., vs. Benson, 56 Or., 147, it was held that a statute authorizing the Board of Fish Commissioners to close streams was a valid law, because the title to fish in the navigable streams in their wild state, is in the state, and the state has the right to prohibit the catching of fish, and this act does not deny fishermen fishing thereon, equal protection of the laws, since the act affects the locality and not the individual. It must not be lost sight of, however, that fish being *ferae naturae*, while in the state of nature, may of common right be captured and taken from navigable waters by anyone, unless forbidden by the law-making power. State vs. Nielson, 51 Or., 588, reversed on other grounds, 212 U. S., 315. In harmony with this principle of what may be termed a natural right of mankind, the courts of Oregon have repeatedly held that, upon its admission into the Union, the State was vested with title to land under navigable water, subject to the public right of navigation and to the common right to fish.

In Hume vs. Rogue River Packing Company, 51 Or., the Court says:

"By virtue of its sovereignty, the state, upon

its admission into the Union, became vested with the title to all the shores of the sea and arms of the sea covered and uncovered by the ebb and flow of the tide, usually called tide lands (citing authorities), as well as of the land under all of the navigable waters within the state; subject, however, to the public right of navigation and to the common right of the citizens of the state to fish therein. (Citing authorities.)"

It is also to be noted that the Supreme Court in this case says that the business of fishing is lawful and its exercise in navigable waters is not only a matter of common and public right, but is the right of citizenship and *property* combined. It is not necessary in this case to determine whether it is a right of property as the rights are to be determined solely by statute.

In Eagle Cliff Fishing Co., vs. McGowan, 70 Or., 12, the Court says:

"The right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state."

Recently, the Court took occasion to re-affirm this privilege in Monroe vs. Withycombe, 84 Or., 335, where the Court said:

"Upon it admission to the Union, Oregon was vested with the title to land under the navigable waters within the state, subject to the public right

> of navigation and to the common right of the citizens of this state to fish (citing authorities). Quoting the language of Mr. Justice Moore in Eagle Cliff Fishing Co., vs. McGowan, 70 Or., 1, 12: 'The right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state'."

While the migratory fish in the navigable waters is in the state in its sovereign capacity, yet, when the State permits by its laws, the citizens of the state to catch fish, the sovereign state cannot grant permission to one citizen and deny it to another. The privileges which the state can grant to its citizens by its laws, must be common to all citizens. This is fixed by the constitution of Oregon in Article I, Section 20, providing:

> "No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms shall not equally belong to all citizens."

In Monroe vs. Withycombe, 84 Or., 334, it appears that the Board of Fish and Game Commissioners, under laws 1913, providing that it shall be unlawful for the Master Fish Warden or Board of Fish Commissioner to grant a license to any person for a set net or to build fish traps in any locality of the Columbia River when in their judgment the same interferes with a prior right of fishing, issued to Robert Farrell three licenses to fish with a pound net fish trap in the Columbia River, which

would extend out into the channel of the river for about 500 to 800 feet from the shore line if constructed and would interfere with the use of the channel by fishermen using gill net and seines or floating gear. At the suit of fishermen holding roving licenses, the Court enjoined the construction of these pound net fish traps and annulled the licenses to Farrell as granting him an exclusive fishery and monopoly inhibited by Article I of Section 20 of the Constitution. In discussing the power of the state to grant licenses to catch fish in navigable waters with fixed appliances which would interfere with the common right of fishing, the Court said:

> "In this jurisdiction, however, the rule is firmly established that the Legislature cannot grant to one person an exclusive right to catch salmon, because when that belongs equally to all citizens of this state is taken from all and vested in only one citizen it is equivalent to transforming a public right, exercisable by all citizens alike, into a private right and monopoly, exercisable by only one citizen, and it is therefore in violation of Article I, Section 20, of the State Constitution. * * * *"

Oregon Laws, 1915, Chapter 16, and amendment by laws 1917, Chapter 409, prohibiting taking of salt water crabs from Coos County for the purpose of sale, and making the statute inapplicable to those engaged in canning business, was in State vs. Savage, 96 O.,. 153, held void as granting a monopoly and exclusive privilege. The Court said:

"No good reason is suggested or can be conceived that in the protection of fish a portion of the people should be subject to prosecution and punishment for the catching or transportation for mercantile purposes of salt-water crabs taken in Coos County, while another class of persons operating canneries should have the exclusive privilege of taking and shipping the same kind of fish beyond the limits of the county for the purposes of sale. The act of 1915 and that of 1917 clearly grants a special privilege or monopoly to those engaged in the cannery business without any good reason therefor, and is discriminatory class legislation, and repungent to Article I, Section 2, of the constitution and void."

These statements of the Court make it clear that the right to fish in the navigable waters of the state is free and common to all the citizens of the state, and to such other persons who are not citizens as may be permitted by law to fish. It cannot be contended by reason of the uniformity of judicial decisions from all jurisdictions that the state has not the right to prohibit persons who are not citizens from fishing in the waters of the state. Unnaturalized foreign-born residents are not deprived of property without due process of law, or of the equal protection of the laws by a state prohibiting such foreign-born residents of the right to fish. Geer vs. Conn. 161, U. S., 519; Patsone vs. Penn., 230 U. S., 146. But when foreign-born residents are granted by state laws the right to fish in common with the citizens of the state,

as was fixed by the compact, it logically follows that their rights stand on the same footing and are equal with resident citizens. This is clearly illustrated in State vs. Darwin, in 173 Pac., 29, where it was held that a native of Austria, who had declared his intention to become a citizen and had been issued licenses for several seasons, in the Puget Sound District, was entitled to a license to fish notwithstanding the state of war between the United States and Austria, and the proclamation of the President concerning the rights of such natives, and a writ of madamus was therefore directed to issue to compel issuance of the license for which application was made. Consequently the right to fish in the navigable waters of this state is free and common to all citizens and unnaturalized foreigners who possess the requisite qualifications fixed by the compact. The right to fish in the navigable waters of Oregon is a recognized occupation, free and common to all citizens.

It is equally true that the state can regulate fishing even to the extent of prohibiting the catching of fish in the exercise of its police power to prevent the species from being extinguished, without impairing any vested property right. See State vs. Hume, 52 Or., 1; Portland Fish Co., vs. Benson, 56 Or., 154; Monroe vs. Withycombe, 84 Or., 335. But this must be done by Legislative act so that it will operate uniformly on all citizens and not by a delegation to a Board of the right to grant to one qualified applicant a license and deny it to another, because it has become the settled construction of the act of Congress admitting Oregon into the Union,

that the right to catch fish in the navigable waters is free and common to all persons possessing statutory qualifications.

Agreeable to the accepted construction of the Congressional Act admitting Oregon into the Union that the right of fishing is "free and common" to all persons possessing the requisite qualifications, and that fishing is a lawful occupation, the legislative assembly has never attempted to vest the right in one person, and deny it to another possessing the same status as to residence and citizenship, except by the act of 1915, Chapter 16, amended by Laws 1917, Chapter 409, held void as discriminating class legislation in State vs. Savage, 96 Or., 153, and by an earlier act (Laws 1899, page 72), granting to riparian owners on certain streams exclusive fisheries in front of their lands, held void, for the same reason, in Hume vs. Rogue River Packing Co., 51 Or., 237. The cases of Eagle Cliff Fishing Co., vs. McGowan, 70 Or., 12, and Monroe vs. Withycombe, 84 Or., 335, supra, were cases arising out of the exercise of the power to grant licenses by the Master Fish Warden, and it was held in these cases that the results which followed from an exercise of the power granted by these licenses for fixed appliances interfered with the common right of fishery, and created a monopoly in the licensee inhibited by the Constitution. The facts upon which the controversy arose in the Monroe case have been previously stated and need not be repeated, but what the court had to say about the power of the Master Fish Warden is much in point. After fully reviewing the

statutory provisions respecting the power of the Master Fish Warden, and the Board, under the regulatory Act of 1913, and the general powers of the Board and Master Fish Warden, conferred by other laws the Court said:

> "The arguments of the defendants is to the effect that Chapter 128, Laws 1913, prohibits the Master Fish Warden and Board of Fish Commissioners from issuing a license for a pound net fish-trap if in their judgment the trap will interfere with a prior right of fishing; that the enactment confers upon the officers power to exercise their judgment and discretion and that in the absence of fraud an exercise of such judgment and discretion will not be interfered with by the courts; that the Master Fish Warden and the Board exercised their judgment and discretion and determined that the issuance of the three licenses to Farrell and the construction of the licensed traps would not interfere with and supervise the judgment and discretion of the Board and Master Fish Warden. * * *
>
> There is, however, an impassable chasm between the power to prohibit all persons from fishing in a stream and an attempt to give one person an exclusive right to fish. The power of a board to close a stream exists only because the Legislature can lawfully favor one citizen with the exclusive right to fish in a navigable stream and consequently the

Legislature can neither directly nor indirectly empower a mere administrative board to do that which the Legislature cannot do. All the citizens of Oregon have a common right to fish in the waters mentioned in the complaint and to deprive any one citizen of that right is to violate the state constitution. To say that the mere issuance of the licenses closes any further inquiry into the existence of prior fishing rights because the courts cannot interfere with the judgment and discretion of administrative officers, is to say that these plaintiffs can be deprived of a right without a hearing, without an opportunity to be heard, and even without notice. Chapter 128, Laws 1913, makes no provisions for a notice or a hearing and it makes no attempt to vest the warden or board with judicial authority; and therefore the issuance of the licenses did not involve any of the elements of a final judicial adjucation of the fishing rights of these plaintiffs. If, on the other hand, the warden and members of the board are considered as mere administrative officers without judicial powers, the licenses issued by them to Farrell are invalid because they operate to confer an exclusive right upon Farrell. While the Legislature has power to authorize administrative officers to issue licenses, yet the validity of such licenses, when issued, is to be determined by the results which follow an exercise of the authority named in the license rather than by the mere words found in the papers called the license.

> While Chapter 128, Laws 1913, does not attempt to adjucate constitutional rights, nevertheless, if in its present form it is regarded as an attempt to do so, it would to the extent of such an attempt be unconstitutional; if, on the other hand, the warden and board be regarded as officers with only administrative powers, the validity of the licenses issued to Farrell is to be determined by the results wrought by them, and when so determined they are ascertained to be ineffective; and therefore in either event the plaintiffs are entitled to a decree preventing the construction of the traps. * * *"

Until the passage of the act of 1919 unnaturalized foreign-born residents had the same right to a license to catch fish in the navigable waters of Oregon as resident citizens, and all unnaturalized residents using gill net trolls under this act are entitled to a license for a period of two years after the passage of the act.

It is a matter of common knowledge in the State of Oregon that the fishing on the lower Columbia River is done for the most part by unnaturalized Norwegians, Swedes and Finns, residents, using seines and trolls and holding what is known as roving licenses and that fishermen on the Columbia River using setnets are but few in number. The provision which deprives unnaturalized foreign residents to fish with *fixed appliances* which we understand affected only two existing licenses for locations and will arouse a suspicion that the law contains a joker, and was the result of ulterior motives, not credit-

able to those who participated in its enactment, as well as the result of sinister influences. The compact between the two states recognized this common and free right of fishery and to fix the qualifications of residence and status as to citizenship for a license to fish in the waters over which the states have concurrent jurisdiction as the same in both states and the compact defines these waters as comprising the waters of the Columbia River and its tributaries within the boundaries of the States of Oregon and Washington, where said waters are state boundaries. In other words, citizens and unnaturalized residents residing in the state for one year are granted an equal right to a license to fish for salmon in the waters of the Columbia River and its tributaries, regardless of the ownership of the bed of the stream by either state. There is no discretion vested in the State Board of either State to grant or refuse a license to foreign born residents possessing the statutory qualifications. The right to a fishing license from the State authorities is absolute in the person possessing the required qualifications upon the tender of the required fees. The Fish and Game Commission may possess certain other powers and duties such as in respect to propagating fish, closing streams to fishing for the purpose of preventing the species from being extinguished, the locations of hatcheries and fish ladders, and other matter, but there is no power of "regulation" in respect to the granting of licenses. In fact, the Board of Fish and Game Commissioners has nothing to do with the issuance of licenses to applicants. The only instance in which they have

any power or discretion in respect to licenses to catch fish, is under the act of 1913, Chapter 128, which makes it unlawful for the Master Fish Warden and the Board of Fish and Game Commissioners to grant a license for a setnet and to build fish traps in any locality in the Columbia River when the same, in their judgment, interferes with a prior right of fishing and it was held in Monroe vs. Withycombe, 84 Or., 328, the mere issuance by the master fish warden to defendant of licenses to build fish traps in the Columbia River did not foreclose inquiry into the existence of prior rights at the locality involved in suit by aggrieved persons to prevent the construction of the traps, since the status makes no provision for a notice of hearing, and makes no attempt to vest the warden with judicial authority, so that the doctrine that the courts cannot interfere with the judgment and discretion of administrative officers has no application.

Let us turn to the laws and see if there is anything contained in them which would give color to the exercise of a discretion by the fish commission in the granting of a license, or Sections 5 and 7 of Chapter 188, which define the qualifications of applicants for a license to catch fish and which we contend is an integral part of the compact. Section 5 provides that no license for taking or catching salmon shall issue to any person who is not a citizen, unless such person shall have declared his intention to become a citizen, and is and has been an actual resident of the state for one year immediately preceding the applications for such licenses, and contains a further

provision that nothing contained shall prevent the issuance of licenses to women, minors of the age of 18 years, provided they possess the requisite qualifications of citizenship and residence, *nor prevent the renewal of licenses for fixed appliances by persons now holding the* same. This provision is identical with Section 43 of Chapter 31, Laws 1915 of the Washington act. An additional provision found in this section of the Oregon act regarding gillnet licenses is found in Section 46 of the Washington act on page 89. This provision was enacted pursuant to the recommendations found in the report of the conference committee of the legislative assemblies of the two states, (see Report and Recommendations of this committee on pages 32 and 33 Transcript of Record and also printed in full in the appendix.)

Section 7 of the Oregon act provides:

> "That is shall be unlawful for any person to fish or take for sale or profit any salmon, sturgeon or other food fish in any of the rivers or waters over which the states of Oregon and Washington have concurrent rights and concurrent jurisdiction, unless such person be a citizen of the United States, or has declared his intentions, in good faith, to become such, and has been for one year immediately prior to the time he makes application an actual resident of the state in which he seeks to obtain his license."

(Section 58 of the Washington act contains the same provision, and adopted pursuant to conference commit-

tee report. See Transcript of Record, pages 34,34.)

Section 8 of the Oregon act provides as follows:

"(a) Licenses herein required shall be issued to any qualified person or corporation by the Master Fish Warden, upon application therefor, and the payment of the license fees herein required; a separate license shall be required for each trap, pound net, set net, fish wheel or other fixed appliance, and for each seine and gill net, and dip net, and for each person trolling for salmon in the waters of the Columbia River, and for each person other than employees engaged in the canning, packing or curing of food or shell fish, and for each person other than employes purchasing or selling food or shell fish, either as principal, agent or broker.

"(b) For each first class pound net of fish trap, license for taking of salmon, $25.00.

"For each second class pound net or fish trap, license for taking salmon, $15.00.

"For each stationary fish wheel, license for taking of salmon, $35.00.

"For each scow fish wheel license for the taking of salmon, $25.00.

"For each purse-seining license for the taking of salmon, $25.00. *Provided,* that no purse-seine shall be of greater length than 1750 lineal feet.

"For each gill net license for the taking of salmon, $7.50.

"*For each set net license for the taking of salmon,* $3.75. * * *"

It is to be noted that the fees fixed for all kinds of fishing gear including traps, weirs, pound nets, etc., are the same as fixed by the Washington act, and adopted pursuant to recommendation of the committee (see report in Appendix hereof) the Washington Act, reads as follows:

"License herein required shall be issued to any qualified person or corporation by the commissioner upon application therefor and the payment of the license fees herein required:

"For each pound net or fish trap license on Puget Sound for the taking of salmon, $50.00.

"For each first class pound net or fish trap license for the taking of salmon on the Columbia River, $25.00.

"For each second class pound net or trap license on the Columbia River, $15.00.

"A first class trap is hereby defined to be a trap on the Columbia River that during the preceding season caught fish of the value or one thousand dollars or more, and a second class trap on the Col-

umbia River that caught during the preceeding season fish of the value of less than one thousand dollars; * * *

"For each set net license for the taking of salmon, $3.75. * * *"

Is there anything in the context of the act which invests the Master Fish Warden with any discretion in the issuance of a license to a qualified applicant upon payment of the license fee required? The provision, "Licenses herein required shall issue to any qualified person or corporation by the Master Fish Warden upon application therefor, and the payment of the license fees herein required," followed by schedule of fishing appliances and gear and the fees therefor, creates a right in the qualified applicant to a license upon payment of the required fee. The wording of the statute is in recognition of the accepted construction placed on the Congressional Act admitting Oregon into the Union, that the right to fish is free and common, and shall be exercised by all persons possessing the fixed qualifications, without discrimination.

It is a significant fact that the Board of Fish Commissioners are not invested with the power to issue fishing licenses. Licenses for catching salmon shall be issued to any qualified applicant by the Master Fish Warden, who is a ministerial employee and not even a member of the State Board. In addition to his duties in respect to issuing a license "to any qualified person upon

application therefor," he has charge of the hatcheries and performs certain duties in respect to enforcing an observance of the fishing laws. But no possible construction of the law requiring persons catching salmon to procure a license, can the law be read other than as a mandatory in respect to the issuance of a license upon compliance with the law, upon payment of the required fee.

The right to the issuance of a license to catch fish is not to be determined by the fact that the title to migratory fish in their wild state is ir the state in its sovereign capacity, and the state in the exercise of its police power can regulate even to the extent of prohibiting the catching of fish, and that the right of a citizen to catch fish in the navigable waters can be denied to unnaturalized foreign-born residents without a denial of due process of law or the equal protection of the law. The state through its law-making power has seen fit to provide that fish may be caught in its waters by fishermen qualified by residence and status by procuring a license and the payment of a fee. The state has granted a right by a law, and this right is available and open to be exercised upon compliance with the terms and conditions upon which the right is granted by every person in the state who has the requisite qualifications fixed by the law. As far as the state is concerned, it cannot grant the privilege of catching fish to one of its citizens and deny it to another, because the sovereign state is limited in bestowing its property and its privileges to bestow it without discrimination among its citizens. Unless forbidden by the law-making power, fish in a state of nature

may be captured and taken from navigable waters by anyone whether citizen or alien. The state can prohibit both citizen and alien from fishing. It can grant the right to the citizen and deny it to the alien without denying him of the equal protection of the laws.

Section 5 of the Act, however, is simply a direction to a public officer to perform a public duty, so as to authorize a person to engage in a lawful occupation. The statute gave him no power to provide rules and regulations governing the issuance of licenses. Where a right is conferred by statute upon a person, he cannot be deprived of it under guise of the exercise of discretion by the officers appointed by the law to carry the act into effect is clearly held in Daniels vs. Wagner, 237 U. S., 547, reversing an opinion of the Circuit Court of Appeals, and the District Court of Oregon. Much that is said in the opinion is applicable to the right under the act under discussion. It was held that under the Forest Act of June 4, 1897, C. 2, 30 Stat. 36, one whose land was included in a forest reserve had the right to apply to the land office, and, on surrendering his land, to obtain the right to enter an equal amount of public lands on offering to do all that the law required, and one who had done everything essential, exacted either by law or the lawful regulations of the Land Department, to obtain a right from the land office conferred upon him by Congress, cannot be deprived of that right either by the exercise of discretion or by a wrong committed by the the land land officers, and, therefore, the fact that an officer of the Land Department commits a wrong by

denying to an individual a right expressly conferred by law, cannot become the generating source of a discriminatory power to make such wrongful act legal, and the action of the Land Department in assuming that it had discretionary power to reject a lieu entry made under the act was not sustainable upon general equitable considerations, such as were made the basis for refusing to issue certificates.

It now remains to be determined whether the appellant has an absolute right to a renewal of the licenses to fish the locations described in the bill. It is alleged in paragraph 12 of the bill that the complainant has fished the waters of the Columbia river for a series of years with setnets in certain described locations in those waters, and he has been regularly issued licenses for previous years by the Master Fish Warden upon his application therefor, and that before the first of April, when all the licenses expire by the terms of Chapter 188, Laws 1915, he applied to the Master Warden for a renewal of the previously issued licenses and tendered the legal fees therefor, but the Master Fish Warden, in pursuance of a conspiracy between Perry Kitzmiller and the Master Fish Warden and members of the Board to defraud him out of his licenses as alleged in other parts of the bill, refused to issue him licenses, but issued them to Kitzmiller under the pretext that the act of 1919 was a valid act and justified the Master Fish Warden in refusing the licenses.

Since filing this suit, the Supreme Court of Oregon

had occasion to construe the commercial fish laws of Oregon, and held that under sections of the laws quoted, and Laws 1913 Chapter 128, that a fisherman on the Columbia River who had acquired or established a set net location to catch fish, had a right of priority or a superior right to a renewal of the license for the following year, if he made application for the license by the first of April, when licenses expire, over another fishermen who had previously fished the location with set nets, but who had failed to fish the locations for several seasons and apply for a license therefor, and who made application for licenses for the same location which had already been issued to a fisherman who had fished the locations the previous season by license from the Board. But before discussing the cases which we contend establish the complainant's right to a license for the locations in question we wish to review the laws of Oregon and the provisions of the compact granting a right of priority for a license to fish locations in the Columbia River with fixed appliances.

Section 2 of Oregon Laws, 1915, Chapter 188 provides:

> "The failure to renew the license, or make application therefor, for any fish trap, pound net, fish wheel, or location for other fixed appliance, in any of the waters of this State on the first day of April of any year, shall constitute abandonment of the location."

(Section 30 of the Washington Act, 1915, Chapter 31, is the same.)

Section 3 of the Oregon Laws, 1915, Chapter 188 provides:

> "Should the holder of any license neglect to construct the appliance called for by said license during two consecutive seasons covered by his license, said location shall be deemed abandoned."

(The latter part of Section 31 of the Washington Act contains the identical provision and it is to be noted that this provision does not apply to the waters of Puget Sound District (Section 32) where a locator or owner of a location has four years granted to him to construct the appliance, but the two-year limitation expressly applies to the Columbia River and its tributaries. It is also to be noted that the same provisions regulating the length of fish gear and width of end and lateral passageways is found in this section of the Washington Act, as is provided in Laws 1913, C. 128, Section 29, covers set nets, the same as the Oregon Act.)

Section 5 of Oregon Laws, 1915, Chapter 188 provides:

> "No license for taking or catching salmon or other food or shell fish, required by laws of this State, shall be issued to any person who is not a citizen of the United States, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the state for one year immediately preceeding the application

of such license, nor shall any license be issued to a corporation unless it is authorized to do business in this state. * * *"

(The Washington Act contains the same provisions in Section 43 and 44.)

Section 8 E., of the Oregon Act provides:

"Any license may be assigned or transferred to any person entitled to hold a license under the provisions of this Act, and notice shall be given of such assignment or transfer within thirty days thereafter to the Master Fish Warden, who shall endorse the date of such notice on the license. If such notice be not given, the license shall be void."

(The Washington Act contains the same provisions in Section 46.)

These provisions are apparently declatory of a superior right or a right of priority in a person holding a license to fish with a fixed appliance, to have the license renewed for the ensuing year over another fisherman making application therefor, provided the fisherman holding the license made application before the expiration of his existing license. This right of renewal grew out of a custom existing on the river, which antedated the enactment of law regulating the catching of fish, that when a fisherman established on the river a location for a fixed appliance that other fishermen recognized the right of the fishermen to fish the location established

the next season, and it was lost to him only by abandonment, and then the location was open to appropriation to other fishermen.

Consequently, when it became necessary for the state to enact laws for the protection of the salmon industry, the right of priority of fishermen fishing in the waters of the Columbia River with fixed appliances in established locations, the laws were drafted conferring the custom and usage, and recognizing this right of priority or superior right to a renewal in the holder of a license to fish a location with a fixed appliance for which he had been previously issued a license, and that the state for years had recognized the right of renewal of a license and followed it for years in issuing licenses for fixed appliance. We ventured the opinion that the rule of statutory construction (17 C. J. 478) that usage may be resorted to by the court to show the contemporaneous and subsequent continuing usage under an Act, as well as the practical construction given it. This rule was recently applied to the construction of an internal revenue statute providing for drawbacks on imported articles which were subsequently exported, in the case of National Lead Company vs. U. S., 252 U. S., 140.

> "From Edward vs. Darby, 12 Wheat. 206, to Jacobs vs. Prichard 233 U. S. 200, it has been the settled law that when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by Department officials, who were called

upon to act under the law and to carry its provisions into effect,—especially where such construction has been long continued, as it was in this case for almost forty years before the petition was filed. * * *"

"To this we must add that the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed, particularly as applied to linseed and its products. * * * *

"The re-acting of the drawback provision four times. .without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute.. (United States vs. Philbrick, supra; United States vs. Falk, 204 U. .S., 143, 152; United States vs., Cercedo Hermanos y Compania, 209 U. S., 337, for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government, (United States vs. Bailey, 9 Pet., 238, 256."

In Williams vs. Seufert Bros. Co., 96 Or., 163, 188 Pac. 165, the Supreme Court of Oregon had occasion to construe these provisions of the statute and held that the failure to renew a license for a fixed appliance for stationary fishing gear by a fisherman holding such

license by the 1st day of April of any year as required by law constituted an abandonment of the fishing location to any person who had secured a license for the same location, on the first of April, and therefore, a prior licensee who failed to renew his license and another fisherman secured a license to fish the locations, the Master Fish Warden or the Board had no power to issue a license to the prior licensee, and a license issued to him was of no force or validity as it interfered with "prior rights of fishing." As this case is a precedent in point in the present controversy, we will state the facts of the case, and quote from the opinion.

In August, 1916, Williams instituted a suit to enjoin Seufert Bros. from the operation of fishing tackle and the occupancy of the location of a scow wheel at a certain point in the Columbia River, and to compel the state authorities to recognize his priority rights, and for restraining and advisory orders directed to the Master Fish Warden respecting duplicate licenses.

Williams alleged that he had been accustomed to fish for salmon from the south bank of the Columbia River from a certain designated point which was described; that from 1910 to 1914 he had been regularly issued licenses to fish from the point described, and that in the year 1913 Seufert Bros. opposed the operation of his scow fish wheel at the point described and loosened the lashings and cables holding fish wheel in position; that on April 1, 1914 he secured a license to operate a scow fish wheel at the point described.

That on the 1st of April, 1914, there was issued to the plaintiff by the master fish warden certain license "O-26" authorizing plaintiff to operate his scow fish wheel at the point described, and that the defendant company again loosened plaintiff's scow; that in August, 1914, defendant company unlawfully occupied the point in question with a scow fish wheel bearing license No. "O-1," and made fast to the same point described, said point being the identical point belonging to plaintiff for fishing purposes under his license and prior rights, and operated said scow fish wheel to the exclusion of plaintiff. In March, 1915, plaintiff applied to the master fish warden for a license for the season 1915-1916, but that defendant company objected to and prevented the issuance of such license until the season was too far advanced for profitable fishing. Plaintiff applied for and was issued a license by the master fish warden dated May 5, 1916, numbered "O-31," purporting to authorize plaintiff to operate a scow fish wheel at the point described, and alleges on information and belief that defendant, Seufert Bros. Company, had been granted a license by the master fish warden covering the identical point in question for the season of 1916-1917. Defendant Seufert Bros. Company claims the exclusive right of fishing at the said point in question to the exclusion of the plaintiff, and without reference to plaintiff's prior rights earned during the past years. That said point does not permit of the operation of two scow fish wheels without interference. That the claimed rights of the defendant company were acquired subsequently, and are inferior to the superior rghts of

plaintiff. That the defendant company operated no scow fish wheel prior to the year 1913, nor claimed any right to fishing at the point in question. That defendant company on August 14, 1916, moved a scow fish wheel to the point, at which time plaintiff was in the act of proceeding to said point with his scow fish wheel under his license, and thereby excluded plaintiff from said point. It is further alleged by plaintiff: that Seufert Bros. during the month of April 1915, erected a stone and concrete wall at the point described which was designed to prevent and does prevent the operation of plaintiff's scow fish wheel. That the plaintiff had submitted the matter to the master fish warden and the board of fish and game commissioners, but that after investigation the board had failed to protect plaintiff's prior rights of fishing, but had instructed the master fish warden to issue duplicate licenses to defendant and to plaintiff. Plaintiff also asks an accounting by the defendant company of all profits derived from its taking fish from the point in question since the 14th day of August, 1916.

The court was called upon to construe sections 2 and 3 of Laws 1915 Chapter 188, providing that the failure to renew the license for a fixed appliance, etc., shall constitute an abandonment of the location, if not made by the first of April of any year, and the failure for two years to construct the appliance called for shall likewise constitute an abandonment of the location, and section 1 of Chapter 128 Laws 1913 providing that it shall be unlawful for the Master Fish Warden to grant a license to any person to build fish traps or any other

fixed fishing appliances in any locality in or on the Columbia River when, in their judgment, the same interfered with a prior right of fishing previously quoted in this brief. In construing the laws quoted the Court held that the right to a renewal of a license to fish with a fixed appliance existed by virtue of the acts quoted, and Williams had lost his right by failure to make application for a renewal by first of April, and a license having been issued to Seufert Bros. Company, before Williams' application, he had abandoned his right, and that Seufert Bros. Company, by securing their license had a priority over Williams, and his license was of no force and invalid. The Court said:

> "It appears from the section of the act first quoted that in the legislative mind it was deemed best for all the citizens of the state, and in furtherance of the interests of the fishing industry, that in order for a person holding a license to fish with a fixed appliance at a certain point in the Columbia river, to protect such right, he must apply for a renewal of the license on or before the first day of April of any year. This arrangement also would tend to prevent a failure to utilize the particular location. Prior to the enactment of Chapter 188 in 1915, 'prior rights of fishing' do not appear to have been clearly defined or limited."

> "The requirement that one holding a license to fish with a fixed appliance shall at some date as early as the 1st day of April of any year make

application for the renewal of the license in order to retain the location is a reasonable one. Otherwise in cases of the abandonment of such fishing locations, citizens desiring to obtain a license and take fish at such abandoned location apparently could not make their arrangements and prepare for securing food fish at the proper season, and consequently the industry would be retarded. If there were no regulation it would tend to confusion and the disturbance of friendly relations between citizens. We believe that the regulations provided for by the statute may well be made without fostering any monopoly or conferring any special privilege upon any citizen which upon the same terms is not granted to all citizens.

"It appears that in 114 there was a conflict of claim between plaintiff, Williams, and the defendant company in regard to a license to fish at the point in question. Prior to that time it seems that plaintiff had fished at different locations in the river and a part of the time at the point involved. In 1915, Seufert Bros. Company applied for a license at the point in controversy, before April 1st, and the license was regularly issued to it. Afterwards, on June 8, 1915, Williams applied to the master fish warden for a license to operate a scow fish wheel at the same point, and apparently copied a portion of the description of the point from the application of Seufert Bros. Company, and we think the application was properly rejected.

"In 1916, Seufert Bros. Company applied for a license for a scow fish wheel at the point described, within the time specified by the statute, and the license was issued April 1st. The application of Williams for the same kind of a license at the same point was not made until after April, 1916. On May 5, 1916, a license was issued to him to operate a scow fish wheel at the point described.

"We are unable to see how this license to Williams could be issued without conflicting with the license of Seufert Bros. Company, and interfereing *with its prior right of fishing granted by its license of April* 1, 1916. *The issuance of the Williams' license does not appear to be in consonance with the spirit of the act of* 1913. Two solid bodies cannot occupy the same space at the same time. It appears that there is not space for two scow fish wheels at the point in question. It seems that the Board of Fish and Game Commissioners investigated the matter of conflict between the two licenses,, but did not issue any order to cancel the license of the defendant company.

"The license issued to plaintiff Williams May 5, 1915, was of no force or validity as against the license regularly issued to the defendant company April 1, 1916.

"It might happen that a license would be issued to a person by mistake or under such conditions that another person might be entitled to a license

to fish at the same place. We do not see how the second license could be issued and be effective without a hearing and adjustment in case of such conflict and the cancellation of the prior license.

*"In our view the statute to which we have referred is determinative of the main question in this case. * * *"*

From the foregoing considerations, it is clear that the right to the issuance of a license to fish for commercial food fish is not a discretionary privilege vested in the Master Fish Warden, but is a statutory right open to all qualified applicants upon compliance with the statutory regulations, and the tender of the statutory fee, and further, persons holding a license to fish with fixed appliances, are vested under the sections of the Act of 1915, quoted, to a renewal of the license, upon application being made before the 1st of April of any year, by the licensee.

The practice of the Master Fish Warden in renewing licenses for fixed fishing appliances upon proper application being made therefor by an applicant to whom one was previously issued had been followed so long and the laws declaratory of this right had become so well known, that every fisherman knew of the custom and the interpretation of the laws. Hence, the respondents, Kitzmiller, Clanton, and members of the Board were fully cognizant of it and appreciated the fact that Olin could not secure the issuance of the licenses to fish these locations which he had been fishing, until Olin was qualified

to fish. And so it is charged that the respondents conspired to secure the passage of a law which would by reason of the mistakes occuring in Olin's naturalization proceedings fully known to the respondents, disqualify him from being issued a license to fish these locations, and thereby the respondent Kitzmiller could make application for licenses to fish these locations, and secure them to the exclusion of the complainant and every one else.

It is a significant fact that the respondent Kitzmiller filed his application for licenses covering the locations on the 17th day of February, 1919, which was long before the passage of the bill by the legislative assembly, and prior to its introduction as a bill for passage. The act became effective the third day of March, 1919, by virtue of an emergency clause. The act purported to amend section 5 of Chapter 188, Laws of 1915, and required a qualification of citizenship for applicants for licenses to take or catch salmon and other food fish, but nothing contained should be construed to prevent the renewal of licenses for fixed appliances by citizens now holding the same, and the large body of fishermen on the Columbia River known as gill-net fishermen were excepted by a provision that gill-net and troll licenses may be granted to applicants who have declared their intentions to become citizens prior to January 1, 1919, and who have otherwise complied with the requirements of residence. It is plain that there was an ulterior motive behind the passage of the law, and we are prepared to show that the motive was to secure the licenses for the fishing location of the complainant, and that only two

licenses in the state were effected by this act, and this fact was well known to the respondents.

It is contended that the court will not inquire into the motives or influence which prompted the enactment of the law; and the district judge so held, but, when a law is invalid, as in this case there is no reason for the application of the rule, and when it becomes important to the rights of a suitor to show that an invalid law was used as a means of circumvention or a tool with which to accomplish an act affecting the interest of those who secured its passage or enactment, there is no reason why the facts if they become material or possess only evidenciary value should not be shown. The reason of the rule has no application to a void law.

It was a part of the conspiracy to deprive the complainant of his right to renew a license to fish the waters of the state, and gave the administrative officers of the state colorable justification for rejecting complainant's application for fishing licenses. It made it possible for the administrative officers of the state to act arbitrarily in the refusal to renew complainant's licenses to which as we have seen, he had a right of priority by *virtue* of the existing laws as uniformly construed by the administrative officers of the state. The charge is not an attempt to impeach a valid law by going behind the law and showing that fraud and corruption were responsible for its enactment, but is a charge that a law which is obviously a nullity was used as a means to

prejudice valuable rights of the complainant. Certainly a void law, which is used as a weapon to destroy a persons' rights is not immune from showing the ulterior motives which brought about its enactment, when it is revelent to an issue tendered.

We firmly believe that appellant has been unjustly deprived of his locations in the waters of the Columbia River to take fish therefrom by means of setnets. The right to fish these locations has been granted to the respondent Kitzmiller and Olin has lost for all time his right of priority to fish these locations, which were recognized by the customs and usages among fishermen as well as the people of the State of Oregon, when they enacted laws declaratory of the custom and usage adverted to, unless the decree is reversed. Respondent Kitzmiller and Clanton, as well as other respondents, were a party to a miserable scheme to deprive this fisherman of his locations and his right to fish in the waters of the Columbia River at which he had earned his living for the past twenty years. This appeal is not prosecuted to secure licenses for the year 1919-20 (licenses for setnets expire March 31 of each year) because his right to take fish from these locations for this period of time is gone, except what right he may have at law for the profits which he could have earned if he had been permitted to fish these locations, or a right to an accounting for the profits earned from these locations upon the reversal of the final judgment of the district court, dismissing this suit, but this suit is continued and appeal prosecuted for the pur-

pose of establishing the right of priority to fish the locations in the waters of the Columbia River for which application was made. He may yet be called upon to file a supplemental bill respecting these questions and it may not be amiss to say that each year he has made application for these licenses, and tendered the fees therefor, and he is now admitted to citizenship.

Obviously, his right to a renewal is a continuing one and he should not be deprived of it by fraudulent conspiracies of state employees who obtained their information of the value of the locations while engaged in the supposed performance of their duties and by arbitrary action of the administrative officers of the state to lend a helping hand to accomplish the wrong and injustice complained about in the bill of complaint.

Respectfully Submitted,

WM. P. LORD,
ARTHUR I. MOULTON,
JAMES E. FENTON.

ACT OF CONGRESS ADMITTING THE STATE OF OREGON INTO THE UNION

Whereas, the people of Oregon have formed, ratified, and adopted a constitution of state government which is republican in form, and in conformity with the constitution of the United States, and have applied for admission into the Union on an equal footing with the other states: therefore:

SECTION I

That Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, with the following boundaries: In order that the boundaries of the state may be known and established, it is hereby ordained and declared that the state of Oregon shall be bounded as follows, to wit: Beginning one marine league at sea, due west from the point where the forty-second parallel or north latitude intersects the same; thence northerly, at the same distance from the line of the coast, lying west and opposite the state, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship-channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla, where the forty-sixth parallel of north latitude crosses said river; thence east, on said parallel to the middle of the main channel of the Shoshones or Snake River; thence up the middle of the main channel of said river, to the mouth of the Owyhee River; thence due south to the parellel of latitude forty-two degrees north; thence west, along said parallel, to the place of beginning, including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common with this state.

SECTION II

The said state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.

OREGON LAWS 1915 PAGE 621
HOUSE CONCURRENT RESOLUTION NO. 3

Be it Resolved by the House of Representatives, the Senate concurring, That a joint committee be appointed, consisting of six members from the House and five members from the Senate, to act with a like committee of the State of Washington for the purpose of conferring on such legislation affecting the fishing industry on the Columbia River as may be of joint interest to the two States, and said committee be allowed the use of one of the regularly appointed clerks or stenographers, and that the chief clerk of the House be instructed to notify the Legislature of the State of Washington of such action.

Filed in the office of the Secretary of State, January 29, 1915.

OREGON LAWS 1915, PAGE 617
SENATE CONCURRENT RESOLUTION NO. 4

WHEREAS, a joint committee consisting of five members of the Senate and six members of the House of the Twenty-eighth Legislative Assembly of the State of Oregon, was appointed by the President of the Senate and Speaker of the House, respectively, under Joint House Resolution No. 3, to meet a like committee of the Washington Legislature, for the purpose of making

such changes in the present concurrent fish legislation on the Columbia River, between the States of Oregon and Washington as they might deem necessary, and

WHEREAS, the said joint committees between the States of Oregon and Washington, did meet in joint session in the City of Portland on the 6th day of February, 1915, and unanimously adopted a report, a copy of which is attached hereto; now, therefore, be it

RESOLVED, That the Senate and the House concurring, do hereby ratify and adopt the attached report of your joint committee; and be it further

RESOLVED, That a committee of one from the Senate and one from the House be appointed by the President of the Senate and Speaker of the House, to draft and present a bill embodying the recommendations of this report to this Legislature, at the earliest possible day.

Filed in the office of the Secretary of State, February 10, 1915.

TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATES OF WASHINGTON AND OREGON

We, your Joint Committee, heretofore appointed to confer, concerning legislation, with reference to the fishing industry in the waters and streams over which said states have concurrent rights and jurisdiction, beg leave to submit the following report:

We recommend that all laws, appertaining to commercial fishing in the waters and streams, over which said States have concurrent rights and concurrent jurisdiction, shall remain unchanged, except in the following particulars, to-wit:

That the Columbia River District shall consist of the waters of the Columbia River and its tributaries within the confines of the States of Washington and Oregon, where the same are state boundaries.

No fish traps shall be located nor used within three gill nets shall be permitted to a point one mile below the miles below the mouth of Lewis River, but fishing with mouths of all of said rivers, and one-quarter of a mile out from where the same empty into the main stream.

That it shall be unlawful in the use and operation of a set net to create any artificial eddy, or erect any structure or obstruction for such purpose.

That no license for taking or catching salmon, food or shell fish shall be issued to any person who is not a citizen of the United States, unless such person has, in good faith, declared his intention to become a citizen, and is, and has been an actual resident of the state for one year immediately preceding the application for said license, nor shall any license be issued to a corporation unless it is authorized to do business in the state, where the application for such license shall be made.

That nothing contained in this suggested act shall be construed to prevent the issuance of licenses to women, minors of the age of eighteen or over, or to Indians, providing such applicants possess the qualifications of citizenship, and residence required under the suggested act, nor preventing the renewal of licenses on fixed appliances by persons now holding the same.

That in the event both states shall provide the same qualifications relating to citizenship, and length of residence, in each state, then, and in that event, all gill net licenses, issued by the States of Oregon and Washington shall be valid as to the waters of the Columbia River in the States of Washington and Oregon as though issued by the Fish Commissioners of the States of Oregon and Washington, and, in that event, the Department of Fisheries, of each state, or the official who has charge of issuing such licenses, shall furnish to each other the name of the licensee and the number of his license without cost or expense to either state.

That it shall be unlawful for any person to fish or take for sale, or profit, any salmon, sturgeon, or other food fish, in any of the rivers or waters over which the States of Oregon and Washington have concurrent rights, and concurrent jurisdiction, unless such person be a citizen of the United States, or has declared his intention, in good faith, to become such, and has been for one year immediately prior to the time he makes application an actual resident of the state from which he seeks to obtain his license.

We further recommend that each of the states represented in this committee shall provide suitable provisions for testing the qualifications of the applicant making such application.

That all license fees and fines, collected under this provision of the law suggested, and recommended by this report shall be paid into the State Treasury, and be

known as the "Fisheries Fund," and that all moneys so collected shall be used for the propagation, protection and perpetuation of the food and shell fishes, and the administration and enforcement of the laws suggested, and recommended in this report.

That we recommend that the license and all other fees shall be as follows:

For each first-class pound net, or fish trap license for taking of salmon on the Columbia River .. $25.00
For each second-class pound net or trap license . 15.00
For each stationary fish wheel, license for taking of salmon 35.00
For each scow fish wheel, license for taking of salmon 25.00
For each purse-seine, license 25.00

And we further suggest that the law suggested shall provide that no purse seines shall be of a greater length than 1750 lineal feet.

For each gill net license for the taking of salmon on the Columbia River, where the same is the boundary between the two states 7.50
For each drag net license, three cents per lineal foot.
For each set net license, for the taking of salmon 3.75
For each bag net license for taking of smelt or herring 1.00
For each license to take crabs 1.00
For each license to take clams and mussels 1.00
For each wholesale dealer in fish, and for each

person engaged in freezing, salting, smoking, kippering, preserving in ice, or otherwise 10.00

For each fish broker, not operating as a packer or canner, a license of 50.00

For each person using scows, boats or other water craft, in buying, handling or transporting food fish, except persons, firms and corporations, operating canneries, packing or curing establishments that pay an annual license fee to the State of Washington, or the State of Oregon where the fish are disposed of for canning, curing, preserving or selling within said states, or either of them, a license of 1.00

For every firm or corporation engaged in canning salmon, shell or other food fish, within the district mentioned, and covered by this report, shall pay the following fees or license, yearly, two cents per case for each case of steel head, blue back or sockeye salmon, and one cent for each case of other varieties of salmon, except that he shall pay for each case of Chinook salmon, packed on the Columbia River, prior to the 26th day of August of each year, four cents per case, and two cents per case for each case of clams, clam nectar, crabs, shad, shrimp, and other food and shell fish, one cent per case.

For each person, firm or corporation using scows, boats, or other water craft, in the buying of fish on the Columbia River, where the same is the boundary between the states hereinbefore mentioned. For each scow or water craft, a license fee of $50.00, which requirement shall not apply to scows, boats or other water craft used in buying fish for and transporting fish to canneries and packing plants that pay an annual license fee to the State of Washington or the State of Oregon, of not less than $100.00.

That for the purpose of the suggested act, a case of fish shall be defined of forty-eight one-pound cans, or bottles, or their equivalent in weight.

For the purpose of this act, all traps taking fish of the value of $1000.00, or more, shall be considered of the first class, and all others of the second class.

Each person, firm or corporation buying, selling or otherwise dealing in salmon and other food or shell fish at wholesale, shall pay to the Fish Commissioner one dollar per gross ton for each ton or fraction thereof, so bought, handled, preserved, or cured, during the preceding calendar year.

We further recommend that legislation be enacted, providing that every person, firm or corporation, operating any of the appliances hereinbefore mentioned, except gill nets, set nets and trolling lines, in the waters hereinbefore suggested, pay to the State for the food and shell fish taken from said waters as follows:

For each one thousand, or fraction thereof, of Chinook salmon, caught in the Columbia River, prior to the 26th day of August, of each year, at the rate of $5.00 per thousand, and for Chinook salmon caught in said river after August 26th and for Tyee, King, Black or Spring salmon, and black mouth salmon at the rate of $3.00.

For each one thousand or fraction thereof, of sock-eye, blue-back or Quinault salmon at the rate of $1.50 per thousand.

For each one thousand or fraction thereof of silver-side or Cohoe salmon, Chum or Fall salmon at the rate of $1.00 per thousand.

For each 100 lbs. or fraction thereof, of smelt, her-

ring, or shad, three cents for each 100 pounds, or fraction thereof. Shrimps, fifteen cents.

For each sturgeon, seven and one-half cents.

For each gross of crabs, ten cents.

For each ton of clams, gross weight, in shell, 75 cents.

We further recommend:

That throughout the weekly closed seasons and closed periods, each pound net, of fish trap, shall be closed by an apron placed across the outer entrance to the heart of the trap or pound net , which apron shall extend from above the surface of the water to the bottom of the water, and shall be securely connected between the piles on each side of the heart of said trap or pound net, fastened by rings not more than two feet apart on taut wires, stretched from the top to the bottom of the piles, and such aprons all be provided with such signals as will show that the same is closed.

We further recommend that suitable criminal legislation shall be enacted to provide for the enforcement of the above provision, and that it be made a misdemeanor for any person to violate any of said provisions, and upon conviction, such party or parties shall be required to pay a substantial fine, not less than $250.00.

We further recommend that it shall be made unlawful for any person, firm, or corporation to purchase any food fish, of any variety, unlawfully taken from the waters hereinbefore mentioned, during any of the

closed seasons prescribed, and that any person who purchases any such fish, during said periods, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not less than $100.00.

We further suggest that legislation be provided to the effect that any person, who, by any means whatever, shall catch or take any salmon, or salmon trout, of any variety, less than fourteen inches in legnth, and shall not immediately return the same alive to the water, or who shall buy or sell, or offer for sale, or have in his possession any such fish, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than $50.00 and that it shall be provided that it shall be unlawful to buy, sell, or have in possession any of the food fish, hereinbefore mentioned, caught or taken in any of the waters hereinbefore mentioned, wherein it shall be unlawful to catch or take the same, and that it shall be unlawful to can or preserve for food any salmon that have been removed from the water for a longer period than sixty hours, unless such fish have been artificially chilled.

We further recommend that it be made unlawful to take or fish for, or have in possession any food fish, of any kind, character or description, unless the same are to be used for food or bait.

That it shall be unlawful for any person, firm or corporation to waste or destroy, salmon or other food fishes, taken or caught in any of the waters hereinbefore mentioned. No person engaged in the canning, pre-

serving or curing of food fish shall purchase or engage a greater quanity of fish than he is able to can, preserve or cure within sixty hours after the same are taken from the water, unless such fish shall be kept artificially chilled.

That it shall be lawful to take, kill, capture or destroy, at any time, in any lawful manner, or to possess or market the Salvelinus mals, commonly known as Dolly Varden or bull trout.

We further recommend that a bounty of $1.00 shall be paid for seal scalps, the same to be paid by the Fish Commissioner, or Fish Warden of the States of Washington or Oregon, or such other official as shall be authorized and directed to pay the same, by the Legislatures of said states, upon proper proof being presented to said official, and the manner of proof to be provided by said Legislatures, and that the sum of $1009.00 shall be appropriated annually by each of said states for the purpose of carrying out said provision.

We further recommend that any person, or persons, shall have the right to take clams, crabs, and mussels in any of the waters hereinbefore mentioned, for the use of such person individually, and for the use of his family or guests, at all times without license.

We further recommend that provisions be made in the law hereinbefore suggested to provide that nothing in the Game Code of either state shall be construed as affecting the commercial fish laws.

In conclusion, we suggest and recommend that a suitable bill, or suitable bills be drawn immediately to present to the Legislatures of the states hereinbefore mentioned, carrying out the recommendations hereinbefore made, and that said bill, or bills, carry an emergency clause so that the same shall be immediately effective as the fishing industry of the states mentioned, will be hindered and injured unless such laws, as we have suggested shall go into immediate effect, and that this report be immediately adopted, by resolution of both houses of each Legislature.

We further recommend that a resolution be passed by the Legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the states of Oregon and Washington shall act as a treaty between said states, subject to modification only by joint agreement of said states.

Respectfully submitted,

I. H. BINGHAM, *Chairman.*

G. E. STEINER, *Secretary.*

ATTEST:

Wash. members of the Com.	Ore. members of the Com.
J. H. Stevenson,	S. C. Cobb,
E. A. Sims,	John Gill,
A. H. Imus,	C. A. Leinenweber,
W. A. Lowman,	R. R. Butler,
A. C. Sly,	J. L. Kelly,
E. L. French,	A. A. Anderson,
J. C. Crawford,	T. B. Handley,
M. C. Harris,	R. S. Farrell,

W. G. Heimly, C. Schuebel,
J. W. Klee. Dr. J. C. Smith.

Note—The recommendations were enacted into Oregon Laws, Chapter 188, Oregon Laws 1915, and Chapter 31, Washington Laws, 1915.

OREGON LAWS 1915, PAGE 618
STATE CONCURRENT RESOLUTION NO. 5

To the Senate and House of Representatives of the United States of America, in Congress assembled:

WHEREAS, the Legislature of the States of Oregon and Washington did appoint committees from their respective bodies to confer each with the other and to recommend legislation necessary to be provided for the regulation, preservation, and protection of salmon and other food fishes in the waters of the Columbia River, over which the States of Washington and Oregon have concurrent jurisdiction, and over waters within the boundaries of said states which might be of concurrent interest; and

WHEREAS, said committees did meet in Portland, Oregon, on the sixth day of February, 1915, and did agree on the necessary measures and legislation to be enacted by the Legislatures of the States of Washington and Oregon, and in their reports to their respective bodies did recommend "We further recommend that a resolution be passed by the Legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the States of Oregon and Washington shall act as a treaty between said States, subject to modification by joint agreement by said States;" and

WHEREAS, said report was adopted by both the House of Representatives and the Senate by the passage of Senate Concurrent resolution No. 4; and

WHEREAS, the Legislature did fulfill the recommendations by enactment of Senate Bill No. 265 which in Section 20 reads as follows:

Sec. 20. Should Congress, by virtue of the authority invested in it under Section 10, Article I of the Constitution of the United States, providing for compacts and agreements between States, ratifying the recommendations of the conference committees of the States of Oregon and Washington, appointed to agree on the legislation necessary for the regulation, preservation and protection of fish in the waters of the Columbia River, over which said States have concurrent jurisdiction, and other waters within either State, which would be affected by said concurrent interest, recommendation being as follows:

"We would further recommend that a resolution be passed by the Legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the States of Oregon and Washington shall act as a treaty between said States, subject to modification only by joint agreement by said States; and said recommendation, having been approved by resolution adopted by adopting the report of the conference committee, then, and in that event, there shall exist between the States of Oregon and Washington a definite compact and agreement, the purport of which shall be substantially as follows:

All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both States. Therefore be it

RESOLVED, THE HOUSE CONCURRING,

That, we urge upon Congress of the United States of America to enact appropriate legislation ratifying and confirming the compact and giving its consent to the compact and agreement between the States of Washington and Oregon as is required by Section 10 of Article I of the Constitution of the United States of America.

Filed in the office of the Secretary of State February 20, 1915.

OREGON LAWS 1915, CHAPTER 188
AN ACT

To provide for regulating the taking of salmon and other food and shell fish from the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, and from other waters within the boundaries of the State of Oregon; licensing appliances therefor; providing for license fees and royalties; providing for the acquisition and holding of fishing locations; licensing dealers, canners and packers of salmon and other varieties of food fish; providing for reports to be made; providing for a compact between the States of Oregon and Washington, relative to waters under concurrent jurisdiction of said States, and providing for ratification thereof by Congress in compliance with Section 10 of Article I of the Constitution of the United States; fixing penalties; repealing all Acts or parts of Acts in conflict with the provisions of this Act; repealing Sections 5235, 5277, 5278, 5279, 5280, 5281, 5284, 5292, 5296, 5297, 5298, 5299, 5300 and 5301 of Lord's Oregon Laws, Chapter 195 of the General Laws of Oregon, 1913, being "An Act regulating the closing of fish-traps in the Columbia and its tributaries during the closed seasons and periods," and Section 4093 of Bellinger & Cotton's Annotated Codes and Statutes, as amended by Section 1 of Chapter 56 of the General Laws of Oregon for 1905, and declaring an emergency.

Section 1. The waters over which the states of Oregon and Washington shall be deemed to have concurrent jurisdiction shall comprise the waters of the Columbia River and its tributaries, within the confines of the states of Oregon and Washington, where said waters are state boundaries.

(*Section 58 of the Washington act contains the same provision, and adopted pursuant to conference committee report.*)

Section 2. The failure to renew the license, or make application therefor, for any fish traps, pound net, fish wheel, or location for other fixed appliance, in any of the waters of this state on the first day of April of any year, shall constitute abandonment of the location.

(*Section 30 of the Washington Act*, 1915, *Chapter* 31, *is the same.*)

Section 3. Should the holder of any license neglect to construct the appliance called for by said license during two consecutive seasons covered by his license, said locations shall be deemed abandoned.

Latter part of Section 31 *of the Washington Act, Chapter* 31, *Washington Laws* 1915, *is the same.*

Section 4. It shall be unlawful in the use and operation of a set net to create any artificial eddy or to erect or use any artificial structure or artificial obstruction for such purpose.

Section 5. No license for taking or catching salmon or other food or shell fish, required by laws of this state, shall be issued to any person who is not a citizen of the United States, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the state for one year immediately preceding the application of such license, nor shall any license be issued to a corporation unless it is authorized to do business in this state. Nothing herein contained shall be construed to prevent the issuance of license to women, minors of the age of eighteen years or over, or to Indians, providing such applicants possess the qualifica-

tions of citizenship and residence hereinbefore required, *nor to prevent the renewal of licenses for fixed appliances by persons now holding the same; provided*, that all gill net licenses issued by the states of Oregon and Washington shall be valid as to waters of the Columbia River in the states of Oregon and Washington, as though issued by the department of fisheries of either state, and the department of fisheries of each state, or the officials who have charge of issuing licenses shall furnish to each other the names of the licenses and the numbers of the licenses without cost or expense to either state.

(*The Washington Act contains the same provisions in Section* 43 *and* 44 *of Chapter* 31.

Section 6. When required by the Master Fish Warden, any person desiring to fish for salmon, sturgeon or any food or shell fish in any of the waters of the State, or waters over which the State has concurrent jurisdiction, may go before a county clerk of any county of this State, or the Master Fish Warden, and furnish satisfactory proof of his citizenship, or of the fact that he has declared his intention to become such, and file his own affidavit and the affidavit of two or more persons to the effect that he now is and for a year prior thereto, has been an actual *bone fide* resident of this State, thereupon such clerk shall issue to him a certificate, briefly reciting those facts, and thereafter in any prosecution against such person, for a violation of the provision of this Act, such certificate or a duly authenticated copy of the records in the office of the clerk, relative thereto,

shall be *prima facie* evidence of his citizenship, and residence, as in this Act required, but in all prosecutions under this Act the burden of proof shall be upon the defendant to establish the fact of his citizenship and residence, *but nothing herein contained shall delay the issuance to any applicant of a license for a fish trap, fish wheel, set net or pound net, which is required by the provisions of this Act to be issued on the first day of April of each year.*

Section 7. That it shall be unlawful for any person to fish or take for sale or profit any salmon, sturgeon or other food fish in any of the rivers or waters over which the States of Oregon and Washington have concurrent right and concurrent jurisdiction, unless such person be a citizen of the United States, or has declared his intention, in good faith, to become such, and has been for one year immediately prior to the time he makes application an actual resident of the state in which he seeks to obtain his license.

Section 58 Chapter 31, Washington Laws 1915 contains the same provision.

Section 8. Licenses herein required shall be issued to any qualified person or corporation by the Master Fish Warden, upon application therefor, and the payment of the license fees herein required; a separate license shall be required for each trap, pound net, set net, fish wheel or other fixed appliance, and for each seine and gill net, and dip net, and for each person trolling for salmon in the waters of the Columbia River, and

for each person other than employees engaged in the canning, packing or curing of food or shell fish, and for each person other than employees purchasing or selling food or shell fish, either as principal, agent or broker.

2. For each first-class pound net or fish trap, license for taking of salmon, $25.00.

For each second-class pound net or fish trap, license for taking salmon, $15.00.

For each stationary fish wheel, license for taking of salmon, $35.00.

For each scow fish wheel, license for the taking of salmon, $25.00. * * *

For each set net license for the taking of salmon, $3.75.

All applications for licenses under the provisions of this Act shall be made on blanks furnished by the Master Fish Warden and accompanied by a sworn affidavit, specifying in detail the location of any fixed fishing appliance or seine, and such information as will enable the Master Fish Warden to determine the correctness of the application.

(d) Licenses shall be valid only for the district or for the connecting tributary streams of the bays, rivers or waters within the district for which they are issued.

(e) Any license may be assigned or transferred to

any person entitled to hold a license under the provisions of this Act, and notice shall be given of such assignment or transfer within thirty days thereafter to the Master Fish Warden, who shall endorse the date of such notice on the license. If such notice be not given, the license shall be void.

(The Washington Act contains the same provisions in Section 46 of Chapter 31 Laws 1915.

Washington concurrent provisions are to be found in Washington Laws 1915, chapter 31, sections 25, 26, 27, 29, 30, 31, 43, 44, 46, 51, 56, 58, 116 and 119.

CHAPTER 128
AN ACT

To prohibit the establishment of fish traps in certain localities and to prescribe the locations of certain fishing appliances on the Columbia River and its tributaries.

Be It Enacted by the People of the State of Oregon:

Section 1. It shall be unlawful for the Master Fish Warden or the Board of Fish Commissioners to grant a license to any person, firm, partnership or corporation, to build or set up fish traps or any other fixed fishing appliance, or drive piles therefor, in any locality in or on the Columbia River and its tributaries in this state, when, in their judgment the same interferes with a prior right of fishing.

Section 2. Whenever any fish trap or any other fixed fishing appliance is built or set up in violation of this Act, the Master Fish Warden of the State of Oregon is hereby empowered, authorized and directed to confiscate and sell said fish trap, and to remove all the

piling driven for such purposes immediately, and he is authorized and directed to pay into the hatchery fund of that district of the State of Oregon the proceeds of said sale.

Section 3. Here follows directions for constructing appliances specifically including set nets * * * * * * * *provided*, this amendment shall not affect any locations lawfully existing under previous statutes when this act takes effect; and any or all such fishing appliances may be maintained upon such existing locations as though this act had not been passed, or they may be changed to conform to the provisions hereof as to end passages, at the option of the location owners and holders thereof.

Section 4. Penalty clause omitted.

Section 5. All acts and parts of acts in conflict herewith are hereby repealed.

(*Filed in the office of the Secretary of State February* 25, 1913. *For concurrent provision see recommendations of joint conference committee, and sections* 29, 31, *and* 32, *chapter* 31, *Washington Laws* 1913.)

OREGON LAWS, 1919, CHAPTER 292
AN ACT

To amend Section 5 of Chapter 188 of the general laws of Oregon for 1915, and to declare an emergency.

Be It Enacted by the People of the State of Oregon:

Section 1. That Section 5 of Chapter 188 of the general laws of Oregon for 1915 be, and the same is hereby, amended so as to read as follows:

Section 5. No license for taking or catching salmon or other food or shell fish, required by laws of this state, shall be issued to any person who is not a citizen of the United States and who has not been an actual resident of the state for one year immediately preceding the application of (for) such license, nor shall any license be issued to a corporation unless it is authorized to do businesses in this state. Nothing herein contained shall be construed to prevent the issuance of licenses to minor citizens of the age of eighteen years or over, or to Indians, providing such applicants possess the qualifications of residence hereinbefore required, nor to prevent the renewal of licenses for fixed appliances by citizens now holding the same. All gill net licenses issued by the States of Oregon and Washington shall be valid as to the waters of the Columbia River in the States of Oregon and Washington, as though issued by the department of fisheries of either state, and the department of fisheries of each state or the officials who have charge of issuing licenses, shall furnish to each other the names of the licensees and the number of the licenses, without cost or expense to either state; provided (a), that for a period of two years after the passage of this act, gill net and troll licenses may be granted to applicants who have declared their intention to become citizens of the United States prior to January 1, 1919, and who have otherwise complied with the requirements of residence.

(b) That applicants for gill net and troll licenses under the preceding clause must not have claimed ex-

emption from military service on the grounds of alien birth.

(c) Should Congress of the United States enact any regulation relative to fishing by unnaturalized residents in the territorial waters of the United States that are more stringent than those embodied in paragraphs (a) and (b) of this section, then and in that event the federal regulations shall cover all exceptions governing applications for gill net and troll licenses to unnaturalized residents for the time said exceptions are allowed.

Section 2. It is hereby adjudged and declared that since existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist; and this act shall, therefore, take effect and be in full force and effect from and after its approval by the governor.

Filed in the office of the secretary of state March 3, 1919. *In paragraphs* 11 *and* 15 *of the complaint* (*T. pages* 20-22) *it is charged that the same bill was introduced in the Washington Legislature during the month of March* 1919 *in accordance with the terms of the compact, but the bill failed to pass.*

OREGON LAWS 1915, CHAPTER 157
AN ACT

To require licenses for fishing for, taking, canning, packing, buying, selling, or otherwise dealing in salmon and other food and shell fish and defining unlawful purchasing.

Be It Enacted by the People of the State of Oregon:

Section 1. It shall be unlawful to take, catch or fish for, buy, sell, can, pack, or otherwise deal in or handle any salmon fish or sturgeon or other food or shell fish in this State or in any waters of this State or in any waters over which this State has concurrent jurisdiction, without first obtaining a license therefor, as provided by law, and any person, upon conviction thereof, for each and every offense, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

Section 2. Whenever it shall state in the laws of the State that it shall be unlawful to purchase food fish, illegally caught, said prohibition shall be construed to mean that it shall be unlawful to knowingly purchase.

SUBJECT INDEX

INDEX TO CASES CITED

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1920, No. 786

CHARLES OLIN,

Appellant,

v.

PERRY KITZMILLER, R. C. CLANTON,
CARL SHOEMAKER, BEN W. OLCOTT,
I. N. FLEISCHNER, C. F. STONE,
MARION JACK AND FRANK WARREN,

Appellees.

Appeal from the United States Circuit Courts of Appeals for the Ninth Circuit

Filed March 7, 1922
(28,143)

POINTS AND AUTHORTIES

I

The title to fish and game within the state of Oregon is in the state in trust for its citizens and not in trust for non-residents or aliens, and the state has power to limit

the right to take or catch such fish to residents and to citizens of the United States.

Eagle Cliff Fishing Co, v. McGowan, 70 Or. 1.
State v. Hume, 52 Or. 1 and 5.
Portland Fish Co, v. Benson, 56 Or. 147, 154; 108 Pac. 122.
Monroe v. Withycombe, 84 Or. 328, 335, 337, 341; 165 Pac. 227, 229.
State v. Savage, 184 Pac. 567, 96 Or. 53.
State v. Blanchard, 189 Pac. 421, 96 Or. 79.

II

No fishing rights of any kind can be obtained in the state of Oregon by custom or usage. If appellant's fishing gear consisted of fixed appliances, his prior right, if any, to a license was based wholly upon statutory provisions.

Hume v. Rogue River Packing Co, 51 Or. 237, 241-261.
State v. Hume, 52 Or. 1, 5-7.
Union Fishermen's Co. v. Shoemaker, 98 Or. 659, 673-676.
Chapter 128, General Laws of Oregon, 1913.
Sections 2, 3, and 5, Chapter 188, General Laws of Oregon, 1915.
Monroe v. Withycombe, 84 Or. 328, 336-39.
State v. Blanchard, 96 Or. 79, 87.
Williams v. Seufert Bros. Co. 96 Or. 163, 174, 180.
Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1.

III

The concurrent jurisdiction of the state of Washington does not extend to the matter of issuing licenses for the operation of fixed appliances within that part of the waters of the Columbia river between said states

which is within the territorial limits of the state of Oregon.

In re Mattson, 69 Fed. 535.
Nielson v. Oregon, 212 U. S. 315, 53 L. Ed. 528, 530.
Nicoulin v. O'Brien, 172 Ky, 473, 80.
Nicoulin v. O'Brien, 248 U. S. 113, 63 L. Ed.
Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1.
McGowan v. Columbia River Packers' Assn. 245 U. S. 352, 62 L. Ed. 342, 344.

IV

If the compact constituted a contract between the states of Oregon and Washington and Section 5 of Chapter 188, General Laws of Oregon, 1915, as amended by Chapter 292, General Laws of Oregon, 1919, violates the obligation of that contract, a proceeding to have same adjudged invalid on that account can only be instituted by the other party to the compact, a person for whose benefit it was made, or one whose vested property rights under the compact are injuriously affected by the amendment.

Any prior right to a license that appellant may have had was not conferred by the compact, but by the state, and was subject to the sovereign power of the state to modify or entirely withdraw the privilege.

Since the compact was not made for the benefit of appellant and did not guarantee him any right of priority to a license or that a license of any kind would be issued to him, he is not a proper party to bring this action.

The Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 629; 4 L. Ed. 629, 657.
Georgetown v. Alexandria Canal Co., 12 Peters 91, 99; 9 L. Ed. 1012-1016.
Bodley v. Taylor, 5 Cranch 191, 223; 3 L. Ed. 75, 84.

German Alliance Insurance Co. v. Home Water Supply Co., 226 U. S. 220, 230; 57 L. Ed. 195, 199.

Clark v. Kansas City, 176 U. S. 114; 20 Sup. Ct. S. C. T. 284; 44 L. Ed. 392, 396.

Lampasas v. Bell, 180 U. S. 276; 21 Sup. Ct. 368; 45 L. Ed. 527.

Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20; 47 L. Ed. 70, 75.

Williams v. Eggleston, 170 U. S. 304; 42 L. Ed. 1047, 1049.

Stone v. Miss., 101 U. S. 814; 25 L. Ed. 1079.

Cram v. Chicago, etc., R. Co., 85 Neb. 586, 19 Ann. Cas. 170.

Parker v. Jeffery, 26 Or. 186, 188.

Hooker v. Burr, 194 U. S. 415, 48 L. Ed. 1046, 1050.

V

The compact does not prevent either state from passing laws in the matter of regulating, protecting and preserving fish which do not affect the concurrent jurisdiction.

Nicoulin v. O'Brien, 172 Ky. 473, 480.

Nicoulin v. O'Brien, 248 U. S. 113, 63 L. Ed. 155.

Neilson v. Oregon, 212 U. S. 315, 53 L. Ed. 528, 530.

Olin v. Kitzmiller (Memo. opinion on same case in U. S. Dist. Court for Oregon.)

Union Fishermen's Company v. Shoemaker, 193 Pac. 476, 194 Pac. 854, 98 Or. 659, 678.

VI

If the conspiracy charged in the complaint did in fact exist and the statute complained of was enacted as a result thereof, its validity would not be affected

thereby. Courts will not inquire into the motives or policy of the legislature in enacting laws.

2 Lewis' Sutherland Stat. Const. Sec. 496, page 925.

6 Am. & Eng. Enc. of Law, 2nd ed, 1087 and cases cited.

Fletcher v. Peck, 6 Cranch 97.

Doyle v. Continental Ins. Co. 94 U. S. 535.

Rose's Notes (Rev. ed.), Vol. 9, p. 746 and cases cited.

Stoppenback v. Multnomah County, 71 Or. 493, 509.

ARGUMENT

There is some conflict in the allegations of appellant's complaint as to whether or not the license involved was for the operation of set appliances or for other types of fishing gear. In paragraph 3 of the complaint appellant alleges that by reason of existing laws and recognized customs he was entitled to, and had been issued, licenses by the state of Oregon for many years to follow his occupation as a salmon fisherman in the waters of the Columbia river over which the states of Oregon and Washington have concurrent jurisdiction, and that he had filed proper application with the authorities of the state of Oregon for a license to catch and take salmon in said waters by means of a set net for the year 1919. In paragraph 17 of the complaint, page 34 of the abstract, appellant alleges

> that the fishing gear and appliances used by complainant in fishing the waters of the Columbia river over which the states of Oregon and Washington have concurrent jurisdiction, in the hereinbefore described locations, is a floating gear and gillnet and is not a fixed appliance or stationery fishing gear.

The following statement on page 67 of the appellant's brief, beginning on the fifth line from the bottom of said page

> The provision which deprives unnaturalized foreign residents to fish with fixed appliances which we understand affect only two existing licenses for locations * * *

clearly indicates that the appellant recognizes the fishing gear which he proposed to operate under the license involved in this proceeding to consist of fixed appliances.

The facts stated in paragraph 17 are set forth as a further and separate cause of suit. Under rule 26 of the New Equity Rules, 1912, the plaintiff may join in one bill as many causes of action cognizable in equity as he may have against the defendant, but said paragraph 17 does not of itself set up any cause of suit or attempt to set forth any different cause of action than is attempted to be set up by the other allegations of the complaint.

It is apparent that appellant did not have two or more different kinds of fishing gear and that his apparent attempt to set up two separate and distinct causes of action arising out of the same facts was intended merely as an explanation of the kind or type of fishing gear referred to in the complaint. It is elementary that further and separate causes of suit must arise out of different conditions or state of fact. If it was intended to set up in paragraph 17 a cause of suit arising out of the effect of the amendment of 1919 upon plaintiff's rights as the owner of a fishing gear separate and distinct from that referred to in the other paragraph of the complaint, the said paragraph is totally insufficient to set up such a cause of action. Apparently such was not the intent, but said paragraph 17 was intended to be in explanation of the character of fishing gear elsewhere

referred to in the complaint. If the description of the gear as contained in said paragraph 17 is correct, the only right that appellant had under the 1915 statutes was the privilege of exercising a right to fish, common to all the citizens of the state of Oregon, and by his pleading he has deprived himself of any right to priority that may have existed in favor of licensees of fixed appliances. It is apparent that the theory upon which this suit is brought is that appellant had acquired some property interest or vested right under the statutes of 1915 of which he is deprived by the statute of 1919.

Sections 2 and 3 of Chapter 188, General Laws of Oregon, 1915, provide:

> Section 2. The failure to renew the license, or make application therefor, for any fish trap, pound net, fish wheel, or location for other fixed appliance, in any of the waters of this state on the first day of April of any year, shall constitute abandonment of the location.
>
> Section 3. Should the holder of any license neglect to construct the appliance called for by said license during two consecutive seasons covered by his license, said location shall be deemed abandoned.

In the case of *Monroe v. Withycombe*, 84 Or. 328, the question of the right of the Master Fish Warden of the state to grant to one person an exclusive right to use fixed appliances for fishing in waters where all citizens have the right to fish was involved. The court held that such license could not be granted because when that which belongs equally to all the citizens of the state is taken from all and vested in only one citizen it is equivalent to transforming a public right into a monopoly exercisable by only one citizen and therefore violative of Article 1, Section 30 of the Constitution, providing that no law shall be passed granting to any citizen or class

of citizens privileges or immunities which on the same terms shall not equally belong to all citizens. The licenses involved purported to authorize the holder to construct and maintain three pound net fish traps at designated places in the Columbia river. At page 337 of the report Mr. Justice Harris, who delivered the opinion of the court, said:

> Not even the legislature could have granted to Farrell the exclusive right to take salmon in waters where all the qualified citizens of Oregon have the common right to take floating fish; and therefore the licenses issued by the Master Fish Warden do not legalize the construction of traps which Farrell purposes to build. The question presented here is not whether all pound net fish traps are per se unlawful; but the sole question for decision is whether the traps which Farrell purposes to build would be unlawful, and that question is determined by the effect which it is conceded that the traps would have upon the common right of all the qualified citizens of this state.

The principle that there can be no priority in the right to a license to fish in the waters of the Columbia river that will interfere with rights common to all the citizens of the state is well established.

Hume v. *Rogue River Packing Co.* 51 Or. 237, 259. (83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 131 Am. St. Rep. 732, 31 L. R. A. (N. S.) 396).

Eagle Cliff Fishing Co v. *McGowan*, 70 Or. 1 and 12, 137 Pac. 766.

State v. *Blanchard*, 189 Pac. 421, 96 Or. 79.

State v. *Savage*, 184 Pac. 567, 96 Or. 53.

Appellant's set nets are fixed appliances, and his right to priority, if it existed, was fixed by statute. (Secs. 2 and 3, Ch. 188 G. L. of Or. 1915.)

That prior rights to a license to fish or any kind of a fishing right can not be acquired in this state by usage or custom is definitely settled by the case of *Hume v. Rogue River Packing Co.* 51 Or. 237.

It clearly appears that, if the license of which appellant claims to have been unlawfully deprived was for the operation of floating gear, custom and usage would not establish any right to priority to such a license, but that the right to same was free and open to all the citizens of the state. By grace of the statutes of this state the same right was extended to aliens upon certain conditions, but the right thus extended was a mere license or privilege subject to withdrawal or modification at any time by the people of the state acting through the legislature.

The single question presented in this proceeding is whether or not if the compact between the states of Oregon and Washington is a contract it conferred upon the appellant vested property rights that would be affected to his injury through the enforcement of Section 5 of Chapter 188, General Laws of Oregon, 1915, as amended by Chapter 292, General Laws of Oregon, 1919, and whether if it did thus affect plaintiff's rights, that constituted an impairment of the contract.

The appellant has set out at some length the resolutions adopted by the legislatures of the states of Oregon and Washington preliminary to the adoption of the compact by said states, and contends that these preliminary resolutions and the remainder of the legislative acts of said states in which the compact is contained constitute a part thereof. This argument may be disposed of by referring to the terms of Section 20 of Chapter 188, General Laws of Oregon, 1915, part of which reads as follows:

> "We further recommend that a resolution be passed by the legislatures of Washington and

Oregon, whereby the ratification by Congress of the laws of the states of Oregon and Washington shall act as a treaty between said states, subject to modification only by joint agreement by said states:" and said recommendation having been approved by resolution adopting the report of the conference committee, then, and in that event, there shall exist between the states of Oregon and Washington a definite compact and agreement, the purport of which shall be substantially as follows:

"All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said states, which would affect said concurrent jurisdiction, shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states."

Section 116, page 115, General Laws of Washington for 1915 (Sec. 5150—116, Remington's 1915 Codes and Statutes of Washington), is substantially to the same effect.

An act of congress of April 8, 1918 (U. S. Compiled Statutes ——), entitled

An act to ratify a compact and agreement between the states of Oregon and Washington regarding concurrent jurisdiction over waters of the Columbia river and its tributaries in connection with regulating, protecting and preserving fish, reads as follows:

"(Columbia River Concurrent State Jurisdiction Over Waters.) That the congress of the United States of America hereby consents to and ratifies the compact and agreement entered into between the states of Oregon and Washington relative to regulating, protecting and preserving

fish in the boundary waters of the Columbia river and other waters, which compact and agreement is contained in section 20 of chapter 188 of the General Laws of Oregon for 1915, and section 116, chapter 31, of the session laws of Washington for 1915, and is as follows:

"'All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said states, which would affect said concurrent jurisdiction, shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both states.'

"Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters."

It is obvious that the compact is limited in its scope to the following:

> All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said states, which would affect said concurrent jurisdiction shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states.

Appellant contends that the meaning of the term "concurrent jurisdiction" has been changed and enlarged by the compact. That term has often been judicially defined and its meaning as applied to the compact is not uncertain. The concurrent jurisdiction of the state of Oregon over the waters of the Columbia

river where same forms a common boundary was fixed by act of congress of February 4, 1859, admitting the state into the union, to be as follows:

> The state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering upon the said state of Oregon so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same, and said rivers and waters and all the navigable waters of said state shall be common highways and forever free, as well as to the inhabitants of said state and as to all other citizens of the United States without any tax, duty, impost or toll therefor.

In the decisions of the courts of the state of Oregon and of the United States construing this act no general rule has been announced, each case apparently having been decided according to the peculiar facts and circumstances involved.

In re Mattson, 69 Fed. 535, was a petition for writ of habeas corpus, the petitioner having been imprisoned upon conviction in the circuit court of the state of Oregon, for Clatsop county, of fishing on Sunday within the territorial limits of the state of Washington in violation of the laws of Oregon. The court held that the states of Oregon and Washington had jurisdiction over the bed of the Columbia river upon their respective sides to the middle of the channel, but that the word "concurrent," when applied to the jurisdiction of Oregon to enact penal laws to be enforced on the Washington side of the Columbia river, can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington or are already in force within its jurisdiction.

In *ex part Desjeiro*, 152 Fed. 1004, the court held that, although the common boundary of the states of

Oregon and Washington is the middle of the channel of the Columbia river and each of said states has concurrent jurisdiction over the entire river, a statute of the state of Oregon, declaring that it shall be unlawful for any person to take salmon in the waters of the state unless such person is a citizen of the United States and has declared his intention to become such and has been a bona fide resident of the state of Oregon or the states of Washington and Idaho for a period of six months, could not be enforced, for the reason that it had not been concurred in by the legislature of the state of Washington, no matter where on the river the act was committed.

In *State v. Neilson*, 51 Or. 588, the defendant, a resident of the state of Washington, was tried and convicted in a court of this state for fishing on the Washington side of the Columbia river with a purse net in violation of the laws of this state. At the time of his arrest fishing with a purse net was lawful under the laws of the state of Washington. The single question presented for determination was whether the law of Oregon prohibiting the taking of fish in the manner stated extended over the entire waters of the river or whether it was confined to the Oregon side. The court held that where adjoining states have concurrent jurisdiction on the waters forming the boundary, the laws of each state regulating the common right to take fish from such waters are valid and binding when not in conflict and that if there is a conflict, the law of that state which is the most restrictive in its character must prevail, and to that extent the state which first assumes, has jurisdicion to the exclusion of the other.

Upon appeal to the supreme court of the United States (*Neilson v. Oregon*, 212 U. S. 315, 53 L. Ed. 528-530), the court said:

Concurrent jurisdiction, properly so called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. (Citing cases.)

* * *

The present case is not one of the prosecution for an offense malum in se, but for one simply malum prohibitum. Doubtless the same rule would apply if the act were prohibited by each state separately; but where, as here, the act is prohibited by one state and in terms authorized by the other, can the one state which prohibits prosecute and punish for the act done within the territorial limits of the other? Obviously, the grant of concurrent jurisdiction may bring up, from time to time, many and some curious and difficult questions, so we promptly confine ourselves to the precise question presented. The plaintiff in error was within the limits of the state of Washington, doing an act which that state in terms authorized and gave him a license to do. Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of opinion that it can not. It is not at all impossible that, in some instances, the interests of the two states may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two states is different, and the one state can not enforce its opinion against that of the other; at least, as to an act done within the limits of that other state. Whether, if the act of the plaintiff in error had been done within the territorial limits of the state of Oregon, it would make any difference, we need not determine; nor whether, in the absence of any legislation by the state of Washington authorizing the act,

> Oregon could enforce its statute against the act done anywhere upon the waters of the Columbia. Neither is it necessary to consider whether the prosecution should be in the names of the two states jointly. It is enough to decide, as we do, that, for an act done within the territorial limits of the state of Washington, under authority and license from that state, one can not be prosecuted and punished by the state of Oregon.

In *Nicoulin v. O'Brien*, 172 Ky. 473, 80, it was held that, in view of the fact that when the state of Indiana was carved out of the former state of Kentucky, the state of Kentucky retained title to the entire bed of the Ohio river where it formed the boundary between said states, the state of Kentucky had jurisdiction over the entire stream between said states to enforce its laws relating to fishing therein. The judgment was affirmed by the supreme court of the United States in *Nicoulin v. O'Brien*, 248 U. S. 113, 63 L. Ed. 155 and 157, that portion of the opinion by Mr. Justice McReynolds material to the question here involved being as follows:

> The territorial limits of Kentucky extend across the river to low water mark on the northerly shore. *Ind. v. Ky.*, 136 U. S. 479, 519, 34 L. Ed. 329, 336, 10 Sup. Ct. Rep. 1051. And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia compact. See *Wedding v. Meyler*, 192 U. S. 573, 48 L. Ed. 570, 66 L. R. A. 33, 24 Sup. Ct. Rep. 322; *Central R. Co. v. Jersey City*, 209 U. S. 473, 52 L. Ed. 896, 28 Sup. Ct. Rep. 592; *Nielsen v. Oregon*, 212 U. S. 315, 53 L. Ed. 528, 29 Sup. Ct. Rep. 383; *McGowan v. Columbia River Packing Asso.*, 245 U. S. 352, 62 L. Ed. 342, 38 Sup. Ct. Rep. 129.

The foregoing authorities appear to have so definitely settled the question of what constitutes concurrent jurisdiction as the term relates to the authority of the states of Oregon and Washington over the waters of the Columbia river where same forms the boundary between them as to leave the question no longer open for argument, the sum and substance of the decisions of the supreme court of the United States being that concurrent jurisdiction authorizes and empowers either state to prosecute all violations of law that are malum in se; that each state has jurisdiction to prosecute violations of law that are malum prohibitum, provided the act is made such by the statutes of both states; that in cases where an act is malum prohibitum under the statutes of one state but not under the statutes of the other, the state in which it is prohibited may prosecute violations thereof committed on waters within its territorial limits, but that its jurisdiction does not extend beyond such territorial limits.

The question here presented is whether or not section 5 of chapter 188, General Laws of Oregon, 1915, as amended by chapter 292, General Laws of Oregon, 1919, is one necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction. If it be conceded that the amendment does change and alter an existing statute of the state of Oregon enacted at the same time that a similar statute was enacted by the state of Washington, it does not follow that such amendment and change is prohibited by the compact. It is very clear that the purpose of the states in the adoption of such a compact was to prevent any change in existing statutes of the two states necessary for regulating, protecting or preserving fish in the waters of the Columbia river, etc., or the enact-

ment of other laws having the same effect, by either state, except with the consent and approbation of the other. Is the law in question of the nature controlled by the compact? If it is of such a nature and the compact is a contract within the purview of that provision of the constitution prohibiting a state from enacting a law impairing the obligation of contracts, it would appear that the state of Washington might by appropriate action cause such a statute, enacted by the state of Oregon, to be declared invalid.

The meaning of the term "impair" is not technical and may be generally defined to mean "to injure," "to lessen." If such be the meaning of the term, does the statute involved impair the value of the compact to the state of Washington? Clearly not. The persons who are affected are not citizens of the state of Washington and it therefore has no interest in them based upon such a relation. The statute was not intended to affect the rights of persons granted a license by the state of Washington to exercise their privileges thereunder within the territorial limits of the state of Washington, but it was a lawful exercise of the police power of the state of Oregon in prohibiting aliens from fishing within the waters of this state, to the detriment of the citizens of this state. The appellant is not a citizen of the state of Oregon nor of the state of Washington, and he has none of the common rights of such citizens to fish the waters of the Columbia river. Any such right conferred upon him is purely a privilege which may be withdrawn in such manner as was adopted in the amendment of 1919.

If the state of Washington could maintain an action to have the Oregon statute as amended declared invalid, it does not follow that such right may be exercised by a citizen of that state and much less does it appear that it can be exercised by an alien who has no rights whatever

in the subject matter of the compact, except such as may have been conferred upon him as a mere privilege by the statutes of the said state. The licenses issued in prior years and the right of priority which might have existed before the amendment of 1919 did not constitute a property or vested right in any sense, and they can not, therefore, make appellant a party to the contract represented by the compact between the states of Oregon and Washington.

Green v. Biddle, 8 Wheat. 1, 16, 68, 5 L. Ed. 547, 551, 554, has been submitted by appellant in support of his contention. The seventh article of the compact made between Virginia and Kentucky upon the separation of the latter from the former state declares:

> That all private rights and interests of lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state.

At page 551 of the report in L. Ed. Mr. Justice Story, in delivering the opinion of the court upon the first hearing, said:

> The seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia as valid and secure under the laws of Kentucky as they were under the then existing laws of Virginia.

The acts of the legislature of the state of Kentucky of the twenty-seventh of February, 1797, and of the thirty-first of January, 1812, materially changed the laws referred to in the compact with reference to the rights of the owners of land situated within the tract transferred from the state of Virginia to the state of Kentucky.

At page 568 (L. Ed.) of the opinion by Mr. Justice Washington, upon second hearing, it is said:

> If the law of Virginia has been correctly stated need it be asked whether the right and interest of such claimant is as valid and secure under this act as it was under the laws of Virginia, by which, and by which alone, they were to be determined? We think this can hardly be asserted. If the article of the compact, applicable to this case, meant anything, the claimant of land under Virginia had a right to appear in a Kentucky court as he might have done in a Virginia court if the separation had not taken place, and to demand a trial of his right by the same principles of law which have governed his case in the latter state.

Without going further into the details of the compact and the laws referred to in the opinion, it is very apparent that the said case is not an authority in support of appellant's contention in the instant case. In the former case the compact provided specifically for the protection of vested property rights of owners of land within the tract to be transferred from Virginia to Kentucky. A violation of the terms of the compact with reference to such rights was a matter in which such property owners were directly interested and their interests were separate and distinct from those of the state of Virginia.

In the instant case the laws relating to appellant's alleged rights which were in force at the date of the compact between Washington and Oregon prescribed the qualifications of alien applicants for a license to fish in the waters of the Columbia river. Section 5 of the Oregon act, which was practically identical with provisions of the Washington act, provided that licenses should not be issued to any person who is not a citizen of

the United States, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the state of Oregon for one year immediately preceding the application for such license. By the amendment of 1919 Oregon did not permit an alien having less qualifications to fish the waters of the Columbia river, but, leaving the provisions of the existing law in full force and effect, provided, in addition thereto, that in so far as the waters within the exclusive jurisdiction of the state of Oregon is concerned,

> No license for taking or catching salmon or other shell fish, required by the laws of this state, shall be issued to any person who is not a citizen of the United States and who has not been an actual resident of the state for one year immediately preceding the application of (for) such license. * * *

It is difficult to conceive in what way this could have impaired the obligation of the contract, if the compact be such, between Washington and Oregon for regulating, protecting or preserving fish in the waters of the Columbia river.

In the case of *Green v. Biddle*, supra, the parties bringing the action were those for whose direct benefit one part, at least, of the compact was made. The compact directly and specifically recognized vested property interests on their part and provided for the preservation and protection of such interests. In the instant case the appellant was a mere licensee in preceding years, having no vested right to a new license. The compact between the states of Washington and Oregon was not made for his benefit, but, on the contrary, was made for the protection of the citizens of the respective states and to prevent either of said states from repealing or altering existing laws in such a manner as to make them less

efficient in protecting the interests of the people, or from enacting new laws which would reduce the protection to fish provided by existing laws.

Wharton v. Wise, 153 U. S. 155, 38 L. Ed. 669, is a case arising out of a compact between the states of Virginia and Maryland containing a provision that

> The right of fishing in the river shall be common to and equally enjoyed by the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.

It was contended that under said provision a right was conferred upon a citizen of Maryland to take and catch oysters in the waters of Pocomoke Sound within the territorial limits of the state of Virginia, but the decision was upon the express ground that the right to take oysters from that location was not provided by the terms of the compact.

In *Bodley v. Taylor*, 5 Cranch 191, 3 L. Ed. 75, the court, by Mr. Justice Marshall, said (p. 84, L. Ed.):

> Neither is the compact between Virginia and Kentucky considered as affecting this case. If the same measure of justice be meted to the citizens of each state, if laws be neither made nor expounded for the purpose of depriving those, who are protected by that compact, of their rights, no violation of that compact is perceived.

That the rights of a citizen in a public contract are not of such a nature as will entitle him to bring an action on account of same where no provision is made for his special benefit is established by the decision of this court in the case of *German Alliance Ins. Co. v. Home Water*

Supply Co., 226 U. S. 220, 57 L. Ed. 195, 199, wherein the court held that

> In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different states. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, creating the privity necessary to enable him to hold the promisor liable. Others make further conditions. But even where the right is most liberally granted, it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who has made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings * * * but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." *Second Nat. Bank v. Grand Lodge, F. & A. M.*, 98 U. S. 124, 25 L. Ed. 76; *Cf. Hendrick v. Lindsay*, 93 U. S. 149, 23 L. Ed. 857; *National Sav. Bank v. Ward*, 100 U. S. 202, 205, 25 L. Ed. 623, 625.

In the *Dartmouth College* case, 4 Wheat. 629, it was expressly said by Mr. Chief Justice Marshall in delivering the opinion of the court

> that the provision of the constitution prohibiting states from passing laws impairing the obligation of contracts had never been understood to embrace other contracts than those which respect property or some object of value and confer rights which may be asserted in a court of justice.

In *Clark v. Kansas City*, 176 U. S. 114, 20 Supreme Court S. C. T. 284, 44 L. Ed. 392, 96, this court, by Mr. Justice McKenna, said:

> The court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it.

The effect of a compact upon the general powers of one of the parties thereto in matters of legislation is illustrated in the case of *Hawkins v. Barney's Lessee*, 5 Peters 457, 8 L. Ed. 190, wherein it was contended that the "occupying claimants" and "seven years' possession" acts of Kentucky violated the seventh and eighth, and particularly the seventh, article of the compact between Virginia and Kentucky.

In commenting upon the decision of the court in *Green v. Biddle*, Mr. Justice Johnson, in delivering the opinion of the court, said (p. 193, L. Ed.):

> And when again upon looking through the course of legislation in Virginia, there was found no principle or precedent to support such laws, the court was induced to pass upon them as laws calculated in effect to annihilate the rights secured by the compact, while they avoided an avowed collision with its literal meaning. But in all their reasoning on the subject, they will be found to acknowledge that whatever course of legislation could be sanctioned by the principles and practice of Virginia would be regarded as an unaffected compliance with the compact.

The policy of restricting aliens in the exercise of fishing privileges in the waters over which the states of Oregon and Washington have concurrent jurisdiction is shown to have been sanctioned by the principles and practice of Washington in the enactment of its statute of 1915, and the exercise by the state of Oregon of its

sovereign power to further restrict the rights of such aliens in this state is in accord with the policy and practice of the state of Washington, and in no sense violates the terms of the compact between the states regulating the catching of fish in the waters of the Columbia river.

In *Hooker v. Burr*, 194 U. S. 415, 48 L. Ed. 1046, the court, by Mr. Justice Peckham, said (p. 1050, L. Ed.):

> We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law, before the courts will listen to his complaint. *Tyler v. Registration Judges*, 179 U. S. 405, 45 L. Ed. 252, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. Ed. 70, 74, 23 Sup. Ct. Rep. 20.

In *Cram v. Chicago, etc. R. Co.*, 85 Neb. 586, 19 Ann. Cas. 170, the defendant assailed an act of the legislature of 1905. The court, by Mr. Justice Dean, said (p. 173, Ann. Cas.):

> Until defendant is shown affirmatively to have been injured, he can not be heard to complain that the act under which the suit is brought is unconstitutional. The rule is thus stated in Cooley, Constitutional Limitations (7th Ed.) 232: "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it." In *Clark v. Kansas City*, 176 U. S. 114, 20 S. Ct. 284, 44 U. S. (L. Ed.) 392, Mr. Justice McKenna cites with approval the foregoing language of Judge Cooley, and adds: "We concur in this view, and it would be difficult to add anything to its expression." *State v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252: "Statutes are not to be declared unconstitutional at the suit of one

who is not a sufferer from their unconstitutional provisions. * * * We can not set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others." In *In re Willington*, 16 Pick. (Mass.) 87, 26 Am. Dec. 631, the court, speaking by Shaw, C. J., says: "Where an act of the legislature is alleged to be void, on the ground that it exceeds the limits of legislative power, and thus injuriously affects private rights, it is to be deemed void only in respect to those particulars, and as against those persons whose rights are thus affected." The following authorities fairly support plaintiff's contention: *People v. Brooklyn, etc. T. Co.*, 89 N. Y. 75; *Williamson v. Carlton*, 51 Me. 449; *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 300; *Currier v. Elliott*, 141 Ind. 394, 39 N. E. 554; *Switzerland County v. Reeves*, 148 Ind. 467, 46 N. E. 995, 6 Am. & Eng. Enc. of Law (2d Ed.) 1090; *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *Sullivan v. Berry*, 83 Ky. 198, 4 Am. St. Rep. 147; *Jones v. Black*, 48 Ala. 540; *Moore v. New Orleans*, 32 La. Ann. 726; *McKinney v. State*, 3 Wyo. 721, 30 Pac. 293; *Dejarnett v. Haynes*, 23 Miss. 600; *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Small v. Hodgen*, 1 Litt. (Ky.) 16; *Henderson v. State*, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Albany County v. Stanley*, 105 U. S. 305, 26 U. S. (L. Ed.) 1044.

In *Union Fishermen Co. v. Shoemaker*, 193 Pac. 476, 194 Pac. 854, 98 Or. 659, it was contended that a statute of the state of Oregon prohibiting the sale or possession of salmon taken beyond the three mile line outside of the Columbia river during the closed season for that river impaired the obligation of the compact. At page

678 of the Oregon report, the court, by Mr. Justice Harris, said:

> The next contention urged by the plaintiffs is that the compact between the states of Washington and Oregon is a contract, and that it is therefore protected by the state and federal constitutions against legislation impairing its obligations: *Green v. Biddle*, 8 Wheat. 1 (5 L. Ed. 547); *Poole v. Fleeger*, 11 Pet. 185 (9 L. Ed. 680); *Virginia v. Tennessee*, 148 U. S. 503 (37 L. Ed. 537, 12 Sup. Ct. Rep. 728); *Wharton v. Wise*, 153 U. S. 155 (38 L. Ed. 669, 14 Sup. Ct. Rep. 783, see also Rose's U. S. Notes).
>
> For the purposes of the instant case we shall assume, without attempting to decide, that the compact entered into between Oregon and Washington is binding upon both parties to the extent that one can not withdraw without the consent of the other, and that therefore one state can not, without the "consent and approbation" of the other state, enact any law which would conflict with the terms of the compact. Again directing attention to the compact, we observe that the two states have expressly limited their agreement to laws and regulations "which would affect said concurrent jurisdiction." As ruled by the United States circuit court of appeals for the ninth circuit in *Olin v. Kitzmiller*, 268 Fed. 348, recently decided: "It is only as to its common right with the adjoining state to take fish from those waters that its right is limited by the compact." This state has not attempted to change the closed season. The prohibition of the Oregon statute is operative only during the periods which both states have fixed as the closed seasons on the Columbia. The inhibition of section 5 merely aids in keeping such seasons closed. Section 5 does not "affect" the "concurrent jurisdiction" of the two states, and, indeed, it recognizes, rather than ignores, the jurisdiction which the two states have concurrently exercised.

In the district court of the United States for the district of Oregon, Mr. Justice Bean, in his memorandum opinion in the instant case, said:

> At the time this compact became effective the laws of each of the states authorized the issuance of licenses to take salmon in the Columbia river to aliens who had declared their intention to become citizens, and no change in that regard has been concurred in by the state of Washington. It is therefore argued that the act of the Oregon legislature is void because in violation of the compact or agreement with the state of Washington.
>
> The law is presumed to be valid and will not be otherwise declared by the courts unless clearly so. On the contrary, the courts will endeavor to so construe the law and the compact as to give effect to both. Assuming, without deciding, that the compact is broad enough to apply to set nets on the Oregon side of the river and within the boundaries of the state, it nevertheless does not appear to me that it limits the right of either state to prescribe the qualifications of persons who shall be licensed to take fish. It is by its terms confined to matters for regulating, protecting, and preserving fish, that is, providing the time and manner of taking fish, the number which may be taken, the apparatus and appliances which may be used and other matters which have a tendency to preserve and protect the fish, none of which are in any way affected by the qualifications of persons who shall be permitted to take fish; the dominant fact to be accomplished by the compact was the protection and preservation of fish, and this was to be done by laws and regulations of the two states having that object in view.
>
> However, if I am mistaken in this, and the act of 1919 is in violation of the compact, the complainant has no right in court to question same. No vested rights of his were interfered with or impaired by the legislature. A license to

> take fish is a privilege granted by the state, and the licensee has no vested right to a renewal of one previously issued.

Appellees submit that the opinion of the circuit court of appeals in the instant case is a clear statement of the effect of the compact upon appellant's rights in this matter.

It should be noted that the concurrent jurisdiction of the states of Washington and Oregon is limited to the waters of the Columbia river. That it does not extend to the bed of the stream or fixtures attached thereto is well settled.

In *Eagle Cliff Fishing Company v. McGowan*, 70 Or. 1, the method of construction and operation of set nets is explained. We quote from the statement of facts beginning at page 4 of the report:

> The defendants herein, as copartners, undertaking to operate under the licenses last mentioned, anchored to heavy rocks, put into the river in front of these sites, and at right angles with the current, wooden buoys, about 4 feet long, and 6x6 inches wide, indicating the lines intended to be occupied by nets 150 to 360 feet in length to be set from 550 to 950 feet apart, and also placed in that stream, about forty feet below the line of low water and in front of these sites, a steel cable about 1,200 feet in length, which wire rope was fastened at each end and in the middle to heavy iron rails that were sunk by a hydraulic pump into the sand to the depth of about a foot. To this cable were attached buoys, the defendants intending to moor thereto vessels having machinery with which seines could be operated and the salmon that might be thus encircled removed without dragging the net to the shore.

In *State v. Blanchard*, 96 Or. 79, at page 99 of the report, drift nets and set nets are defined as follows:

> A drift net is a net with both ends free to drift with the current; a set net is one fastened at one or both ends so that the whole net can not drift with the current and notwithstanding this be in a condition to take fish.

In *McGowan v. Columbia River Packers Association*, 245 U. S. 352, 62 L. Ed. 342, this court held that the concurrent jurisdiction of the state of Washington did not extend to the removal of a nuisance such as the set nets described in the *Eagle Cliff Fishing Co. v. McGowan* case because it did not reach the bed of the stream, and the officers of the state of Washington would have no authority to intermeddle with the defendants' nets anchored to the bed of the river within the territorial limits of the state of Oregon. Citing *Wedding v. Meyler*, 192 U. S. 573, 585, 48 L. Ed. 570, 575.

Appellant insists that he was deprived of his license through a conspiracy between the appellees and representatives of the legislature. The seventh assignment of error is that:

> The court erred in holding that it could not inquire into the motives and influences which prompted the enactment of Oregon Laws, 1919, Chapter 292.

It is alleged in paragraphs 7 and 8 of the complaint (pages 14 to 17 of the transcript) that a conspiracy was entered into between the appellees to deprive appellant of his licenses and to provide that the license to which he was entitled should be issued to the appellee, Kitzmiller, and that as a result of such conspiracy the act known as

chapter 292, General Laws of Oregon, 1919, was enacted. Had such a conspiracy been entered into with the results alleged, it is very apparent that it could have no effect upon the validity of the act of 1919, alleged to have been enacted as a result thereof. The policy of moral justice or expediency of a statute is not to be considered by the judiciary in determining its validity.

2 Lewis' Sutherland Stat. Const., Sec. 496, p. 925.

6 Am. & Eng. Enc. of Law, 2d Ed., 1087, and cases cited.

Fletcher v. Peck, 6 Cranch 87.

Doyle v. Continental Ins. Co., 94 U. S. 535.

Stoppenback v. Multnomah County, 71 Or. 509.

Respectfully submitted,

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OLIN *v.* KITZMILLER ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 246. Argued April 21, 1922.—Decided May 29, 1922.

The compact between Washington and Oregon, approved by Congress April 8, 1918, agreeing that all laws and regulations for regulating, protecting or preserving fish in the waters of the Columbia River of which the two States have concurrent jurisdiction shall be made and altered only with the consent of both States, and the

[1] Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

provision in the acts in which they accepted the compact, that no license to fish shall be issued to any person not a citizen of the United States unless he has declared his intention to become such, etc., were not intended to prevent either State from narrowing the licensable classes, e. g., by excluding persons who are not citizens. P. 263.

268 Fed. 348, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed, for want of equity, a bill by which the plaintiff sought to compel the defendant officers of the State of Oregon to issue him a license to fish in the Columbia River.

Mr. Arthur I. Moulton, with whom *Mr. Wm. P. Lord* and *Mr. James E. Fenton* were on the brief, for appellant.

Mr. Willis S. Moore and *Mr. W. W. Banks*, with whom *Mr. I. H. Van Winkle*, Attorney General of the State of Oregon, and *Mr. James G. Wilson* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The bill was dismissed upon motion by the trial court for want of equity and the Circuit Court of Appeals affirmed this action. 268 Fed. 348.

Appellant—a native of Russia who has declared his intention to become a citizen of the United States—claims the right to fish in specified locations in the Columbia River and seeks a mandatory injunction requiring the Master Fish Warden and other officers of Oregon to issue a license therefor.

His prayer is based upon the theory that so much of c. 292, General Laws of Oregon, 1919, as directs that no fishing license "shall be issued to any person who is not a citizen of the United States" impairs the obligation (Const., Art. I, § 10) of the compact and agreement be-

tween the States of Washington and Oregon ratified by an Act of Congress approved April 8, 1918—c. 47, 40 Stat. 515—which follows:

"The Congress of the United States of America hereby consents to and ratifies the compact and agreement entered into between the States of Oregon and Washington relative to regulating, protecting, and preserving fish in the boundary waters of the Columbia River and other waters, which compact and agreement is contained in section twenty of chapter one hundred and eighty-eight of the general laws of Oregon for nineteen hundred and fifteen, and section one hundred and sixteen, chapter thirty-one, of the session laws of Washington for nineteen hundred and fifteen, and is as follows:

"'All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both States.'

"Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters."

The statutes in which the States accepted the compact are not identical, but each one provides—

"No license for taking or catching salmon or other food or shell fish, required by laws of this State, shall be issued to any person who is not a citizen of the United States, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the State for one year immediately preceding the application for such license, nor shall any license be issued to a corporation unless it is authorized to do business in this State." Oregon Laws, 1915, c. 188, § 5; Washington Laws, 1915, c. 31, § 43.

Appellant's postulate is that the quoted provision read in connection with the compact inhibits each State from restricting its fishing licenses to citizens of the United States without consent of the other. If this is unsound, no foundation exists for his claim and all other questions may be disregarded.

Considering the object and nature of the compact and the two Acts of 1915, we cannot conclude that the parties intended by the identical provision to obligate themselves to issue *any* fishing license; the purpose was to limit the classes of persons who might have them—beyond which the State might not go. There is no inhibition against narrowing these classes nor indeed against a refusal to issue any license. The Oregon legislature acted in harmony with the compact when it excluded aliens; there was no impairment and the judgment of the court below must be

Affirmed.